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THE  
NATURE and CONSTITUTION  
OF  
RIGHTS, HERITABLE and MOVEABLE.

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PART I.

OF HERITABLE RIGHTS irredeemable and  
redeemable.

PRELIMINARY.

*Concerning dominium, and the transmission of  
rights and property in general.*

**W**HAT is the dominium or pro-  
perty?

Dominium or property is the  
using or disposing upon what is  
ours, except in so far as we are restricted by  
law or paction; and it is a general principle,  
that we are not to use our own so as thereby  
chiefly to prejudice our neighbours.

How does a person come to acquire the pro-  
perty of any subject heritable or moveable?

There are several ways how we come to ac-  
quire the property of things; but the most or-

dinary one, that seems proper for our design, is by tradition, which is a delivery of possession by the true owner, with a design to transfer the property to the receiver. This delivery is either real, as the delivery of a thing itself, viz. horse, cow, silver tankard; or symbolically, as the delivery of a little earth and stone, in place of the lands themselves: For where the thing cannot be truly delivered, the law allows some special symbols or marks of tradition.

Is tradition or possession of itself a sufficient transmission of property?

Though of old there was no more necessary for the transmission of property, but the simple putting the purchaser in possession of his purchase, as may be observed from Gen. xxiii. ver. 14. *ad finem*; and xxv. 9. 10. and xxxiii. 19. Ruth iv. 7.; yet nevertheless, as honesty and ingenuity decayed, and when parties would not rely on others bare words, nor the bare entering them into possession, writ became necessary in the transmission of lands as well as tradition. An example of this we have in Jeremiah's days, Jer. xxxiii. 9. 10. &c.; and now writ is absolutely necessary; but yet, without tradition the right is incomplete: So that tradition or possession from a preceding just title completes the right; and he who gets the last right with the first possession, in a competition, is still preferred to him who had the first right and the last possession. *Erskine's instit. title, Division of Rights, page 105. et seq.*

S E C

## SECTION I.

*Of the constitution of heritable rights by charter and seisin.*

**H**OW are rights divided and distinguished?

They are divided into heritable and moveable, whereof some are redeemable and others irredeemable rights.

What is an heritable right?

Heritable rights, in a strict sense, are only lands; but that is accounted heritable, in a legal sense, which belongs to the heir.

What are moveable?

Sums of money, and other things which can be moved from one place to another, are moveable; and generally all that belongs to the executor.

How are our heritable rights regulated?

By the feudal law, whereby *feudum*, which we call a feu, is defined to be a free gratuitous right to lands, made to one for service performed by him to the granter.

How is he called, or what designation does he get, that grants this feu; and how is he called to whom it is granted?

He who grants, is called the superior; and he who receives, the vassal. The superior's right to the feu is called *dominium directum*, and the vassal's right is called *dominium utile*.



What is the name of that right which the superior gives to the vassal?

It is a charter, and this charter, with the seisin thereon duly registred, compleats the vassal's right.

What is a charter?

It is, in effect, a disposition of the feu made by the superior to the vassal.

How many kinds of charters are there?

There are two kinds, original charters, and charters by progress.

What is an original charter?

An original charter, or right granted by the superior to the vassal, which constitutes the feu, the service to be paid, and manner of holding.

What is a charter by progress?

A charter by progress, is, when the right to the feu is renewed to the vassal's heir or singular successor; and of this kind of charters there are two sorts, viz. charters of resignation, and charters of confirmation. A charter of resignation proceeds upon the vassal's resigning the lands in the superior's hands for new infeftment, either in favours of the vassal himself, or of some third party. A charter of confirmation, is, when a superior confirms a right formerly granted by himself to the vassal, or by the vassal to a third party.

How many parts does a charter consist of?

Of six parts, viz. *First*, The narrative, which expresseth the cause for which it was granted. *Secondly*, The dispositive clause, which contains

contains the lands disposed; and regularly, a charter gives right to no lands but what are contained in this clause, though they should be enumerated in other parts of the charter.

*Thirdly*, The *tenendas*, wherein is expressed how the lands are to be holden, so called from the first word of the clause. *Fourthly*, Which contains what the vassal is to pay, or perform, to the superior for the feu; and this duty is called the *reddendo*, because the clause whereby it is payable begins with *reddendo inde annuatim*, &c.

*Fifthly*, The clause of warrandice. *Sixthly*, The precept of feisin, which is a command by the superior to his bailies, to give actual state and feisin to the vassal, or his attorney, by tradition of earth and stone; and then follows the clause of subscription.

Is feisin necessary to be taken upon the charter?

Yes; because it is absolutely necessary for transferring the dominium or property, and till it be given, the vassal's right is incomplete; and this feisin must be registred within sixty days after the date of it, either in the general register of feisins kept at Edinburgh, or in the particular register of the shire, stewarty, or regality, where the lands lie, (*Jas. VI. par. 22. act. 16.*) else they will not be valid against singular successors; that is to say, if any other person buys the lands, he will not be obliged to take notice of that feisin. But the feisin unregistred will still be good against the granter and his heirs.

When

When you was enumerating the several parts of a charter, you gave a brief description of the nature of all the clauses, except that of warrandice; Pray what is warrandice?

Warrandice is that clause whereby the superior disposing, or any other person from whom a right is acquired, obliges him to make good the thing warranted to the acquirer.

How many kinds of warrandice are there?

There are two, viz. personal and real.

What is personal warrandice?

Personal warrandice is when the author-disponer is bound personally; and is either simple warrandice, which is only from subsequent future deeds of the granter; or, secondly, warrandice from fact and deed, which is, that the granter has not done, nor shall do, any deed prejudicial; which is to warrant against all mortals.

What is real warrandice?

Real warrandice, is, when investment of one tenement is given in security of another.

What is the effect of warrandice?

The effect of warrandice, is, that if the thing warranted be taken away, there is competent, to the party to whom the warrandice is granted, an action of relief.

## SECTION II.

*Of the several kinds of holdings, and the casualties due to the superior by each.*

**H**OW many kind of holdings are there, and how are they divided?

Into five, viz. ward, feu, blench, burgage, and mortification.

What is ward holding?

Ward-holding, called, *servitium militare*, is the properest holding, because feus were originally, given for military service; and so called because of the ward of the vassal, whereby the superior has the full mails and duties during the male vassal's minority; and, in case of a female vassal, till she be fourteen years complete.

What is the reason that the superior, in case of a male vassal, has right to the full mails and duties during the male vassal's minority; but, in case of a female vassal, only till she be fourteen years complete?

The reason is, because that the feu being originally to the vassal for military service, the law presumes, that the minor is not able to serve his superior in the wars, and therefore the fee returns during his minority; and because the female, at the age of fourteen years complete, may marry a husband, who may be able to serve the superior in the wars; and he being served has no further claim on this head.

How



How shall the ward vassal be entertained if the superior has right to the rents of his lands?

The superior, or his donator, is obliged to entertain the male vassal during his minority, and the female vassal under fourteen years, if he or she have no other feu or blench lands; and also, to uphold the houses, parks, &c. in as good condition as they found them, and must find caution for that effect.

What are the other casualties falling due to the superior of ward lands?

The other casualties, beside the ward itself, which is already explained, that falls due to the superior, are, recognition, disclamation, and marriage; non-entry, relief, and liferent-escheat are common in all holdings, (burgage and mortification excepted). We shall refer the consideration of these, till the nature of the several holdings are first explained; and now let us return to that of recognition and marriage, as peculiar only to a ward-holding.

Well then, what is recognition?

Recognition is that casualty, by which the ward lands recognise or return to the superior for ever, through the vassal's alienating more than the half of his ward lands to any, except his apparent heir, who is *alioque successurus*, without his superior's consent.

What if the ward vassal, at one time, sell only a parcel, not so much as the half of his lands, and thereafter should sell as much, as, with the former sold, would be more than the half,



alf, and all this without the superior's consent: Would the vassal lose his feu?

Yes; not only would he lose his feu remaining, but also the first purchaser would lose his right, if it was not confirmed before he took infeftment; and this holds even when lands are put wadset, though the back tack-duty does not extend to the value of the lands, if the lands wadset exceed the major part of the te-  
nement\*.

For what reason was this recognition introduced, that seems so hurtful to the vassal?

It was introduced to punish the ingratitude of the vassal, who should not have disposed the lands, which, 'tis presumed, he got gratuitously from the superior, without his own consent.

What method must be taken to secure against this recognition when the vassal designs to sell ward lands?

The vassal, or rather the sub-vassal, to whom he disposes, should get the superior's confirmation, before the sub-vassal takes infeftment; or the vassal should get a consent or licence from the superior to sell the ward lands, wherein he obliges himself to confirm the right.

Is there another way that takes off this recognition?

There are severals; such as, *first*, If the seisin taken on the vassal's disposition be effectually null, it infers no recognition; because, in that case, there is no right transmitted. *Secondly*,

\* Eskin is of a different opinion, p. 145. 7th July 1681. Hay.

condly, Not only the superior's granting right to his vassal, but also his acquiring a right from him on the lands, takes off the effect of recognition; provided these rights be posterior to the deeds inferring recognition, and, on the superior's part be voluntary, i. e. not in obedience to a charge of hording. *Thirdly*, A confirmation, or a novodamus, if it express recognition, or the superior accepting service, or pursuing for the casualties, posterior to the deeds inferring recognition, because they infer the superior's acknowledgment of the vassal's right; and inhibition raised and executed before the recognition secures against the same by a particular statute, James VII. parl. 1 and 4. *Mr Kenzie's inst. ed. 7. page 95, and 96, with the notes on each.*

Does recognition take place in any other holding?

No; except when it is specially provided but though the ward-holding be taxed, yet recognition of these lands is incurred, as if they were not, and as if the lands held simply ward.

What is the marriage due to the superior by a ward-holding, and the avails of the marriage?

Marriage is that casualty by which, when the ward vassal dies, leaving an heir, whether a minor or major, unmarried, the superior has right to the value of the tocher the vassal gets with his wife, called the avail of the marriage but there is both a double and single avail of the marriage, and the modification of both is referred to the Lords of Session. The superior

or has right to the single avail, whether he offer a woman agreeable to the vassal to be his wife, or not; but if he offers the vassal his equal, and he refuse, and marry another person, then the superior gets the double avail. The single avail is ordinarily modified by the lords to two years rent of the vassal's free estate; and the double avail, to a year more, which is in haill three years free rent.

Supposing there were heirs, portioners, is there an avail due for each?

No; there is but one avail due for them all?

Is marriage due on any other but a wardholding?

Not by the nature of the holding; yet it may be due by express paction; and there are many in Scotland who hold their lands feu, *cum maritagio*.

Is marriage *debitum fundi*?

Yes; both in ward-holdings, and in feu, *cum maritagio*.

Where a vassal holds ward lands of more superiors than one, does the casualty of marriage fall to each?

No; it falls only to the eldest superior, who is he from whom the vassal had the first feu.

What is the reason why this casualty of marriage becomes due?

Some think that the reason of it was, because it was not just, that the vassal should bring in a stranger to be mistress of the feu, without the superior's consent; for else, he might chuse a wife out of a family that was an

B

enemy

enemy to the superior. But M'Kenzie says, that he thinks both ward and marriage proceeded from an express paction betwixt King Malcolm Kenmure and his subjects, when he first feued out all the lands in Scotland.

What is that you call tax-ward?

Tax-ward is when the superior agrees with the vassal to accept an annual liquid quota, in place of the mails and duties falling due by the ward; and the marriage is ordinarily taxed, when it falls due.

Does the taxing of these ward duties alter the nature of the holding; and does the vassal lose his feu, if he sells more than half of the lands holden tax-ward, without his superior's consent?

The nature of the holding is still the same, and in noways thereby altered, being only the casualties falling due by the ward that are taxed; and the lands recognise in the same manner as if these duties were not taxed.

When the ward vassal sells part of his lands to another person, to be holden of the dispenser, how is the holding called?

It is called back-ward, or ward-upon-ward.

What is a feu-holding?

A feu-holding is that, whereby the vassal is bound to pay a yearly sum of money, or quantity of victual, to the superior for his feu, called the feu-duty: And if the vassal neglect to pay his feu-duty for two years past, and the third current, then he loseth his feu by law, though there be no such clause irritant in his charter;

and



and more especially when there is such a clause.

But how shall the superior come to the possession of the lands, and complete his right in this case?

The superior may pursue a declarator of himself of the feu against the vassal, and a removing; in which action he may also pursue for the feu-duty resting; and, upon obtaining decret, he can remove the vassal, and enter into possession, whereby the right becomes fully established in his person.

Will not the vassal be allowed to purge; that is, to pay up his feu-duty at the bar, in the action of declarator, and thereby save his feu?

There is a difference here to be observed, and that is, if there be no clause irritant in the charter, then the Lords allow purging at the bar; but if there be such a clause irritant, as that upon the vassal's suffering two terms to run into the third unpaid, that then the vassal shall lose his feu, he will not be allowed to purge at the bar; and the reason of this is, because it is thought express paction is stronger than the law.

What is a blench-holding?

A blench-holding is that, whereby the vassal is bound to pay an elusory duty; as, a rose, a penny, a pair of gloves, &c. as a mere acknowledgment of the superior; and, because of this, it is ordinarily with this quality, *si petatur tantum*.



Are these blench-duties due unless they be annually required?

It seems they are not, unless they be annually demanded; neither does any subject-superior require them: But the exchequer values those duties when they can be estimated; as when the duty is, a pair of gloves, a pair of spurs, &c. and exacts them for all bygones, within the years of prescription.

What is a burgage-holding?

Burgage is that kind of holding, whereby all burghs-royal, by their charters of erection, are bound to the duties of watching and warding; and, in this holding, the burgh itself is vassal, and not the particular burgeesses.

By whom are seifins given in burghs-royal?

These seifins can only be given by the present bailie of the burgh, as the king's bailie; and no notary can be notar thereto, but the clerk of the burgh.

Where are these seifins registrated?

Seifins, within burghs, are registrated in a register of seifins, reversions, &c. kept for that end, by the town clerk, belonging to the magistrates and council.

Does this register of seifins, within burghs, depend on the clerk-register, as all other registers of seifins, &c. for the shire, stewarties, &c. do?

No; they depend entirely upon the magistrates, by a particular law; and therefore a minute-book of these seifins is ordained to be kept, and to be quarterly compared, by the magistrates,

magistrates, with the principal register; which, may be thought, is done as a check upon the town clerk, that it may not be in his power to insert in the register any seisin, but such as are truly given by the magistrates; which otherwise he might do, and would prove of dangerous consequences.

What kind of holding is mortification?

Mortification is that kind of holding, whereby colleges, hospitals, &c. are bound to pay the duties of *preces et lacrymæ*, for lands and others mortified to pious uses; and thereby the society becomes vassal.

Can lands be mortified without the superior's consent?

No; for as the society becomes vassal, it never dies; and thereby the superior loses many casualties, which otherwise would fall to him: and the barons of exchequer, since the union, have refused to pass signatures of lands holding of the Crown, in favours of any corporation, society, or body politic, lest the revenues of the Crown should be thereby diminished.

You told me formerly, that disclamation, non-entry, relief, and liferent-escheat, were casualties common to all holdings, burgage and mortification excepted; and that they arise, and are due by the nature of the feu. Well then, what is disclamation?

It is a vassal's open and wilful denying of his superior?

How is the disclamation incurred, and what is the effect thereof?

This is done verbally, in judgment, or realty, out of judgment, by taking a charter from another superior; and by this the vassal loseth his feu: but any probable ground of ignorance will prevent this forfeiture.

What is non-entry, and the effect of it?

Non-entry is a casualty, whereby the superior, when the vassal dies, (and the vassal lies out unentered) has a right to the mails and duties of the vassal's lands, while there is not a vassal entered; or when the vassal's right is reduced, when he is entered: But this casualty is restricted to the retoured duty, before the declarator of non-entry; but afterwards, the superior has right to the full mails and duties during the non-entry.

Does the courtesy or terce affect the non-entry?

Yes; they affect both non-entry and ward; and therefore defend against the superior.

What is the reason that this casualty of non-entry is due to the superior?

The reason is, because the feu being given to the vassal for service, the law allows the feu to return to the superior, when there is no vassal to serve him, that he may provide himself in another who will: and the reason of the difference as to the retoured duties and full mails, is, because after citation, in the declarator of non-entry, the vassal lying out unentered, is in a greater contempt, and therefore more severely punished.

What is that retoured duty you speak of?

Before

Before I give you a direct answer, know that there was, of old, a general valuation of all the lands in Scotland, said to be made *tempore pacis*, and another after, said to be made *tempore belli*; the former called the old extent, and the other called the new extent; and which, because *tempore belli* was greater than the former. These extents are called the retoured duty, because they are expressed in the retour, or return, made to the chancery in the service of an heir, in answer to that head of the brieve concerning the worth of the lands; and though they be far below the value of the lands, yet the law presumes the new extent to be the real worth; and this is the retoured duty.

What if the vassal be only an annual-renter, what is the casualty that falls due to the superior upon his non-entry?

The casualty, in case of an annual-renter, is only the blench-duty, till special declarator; and thereafter, the whole annualrent till the entry of the vassal.

Is the superior, in every holding, bound to accept of this retoured duty, till declarator, in place of the full mails and duties in case of non-entry?

There is an exception in that of a wardholding, whereof the superior is in possession by virtue of the ward; for then also he retains right to the full rents and duties, for the non-entry, as well before as after declarator.

What is relief?

The relief is an acknowledgment paid by the  
the



the vassal to the superior for entering him, and relieving the lands out of the superior's hands. It varies according to the nature of the holding; for in feu and blench-holdings, it is only the double of the feu; but in a ward-holding, it is the full mails and duties of the lands, if the superior was in possession by virtue of the non-entry; if he was not, it is only the retoured duty.

What is liferent-escheat?

Liferent escheat is a right to the rents, mails, and duties of the vassal's lands; and comprehends only lands to which the vassal had right during his own life-time.

How comes this liferent-escheat to fall to the superior?

The liferent-escheat falls to the superior by the vassal's being denounced rebel, and remaining at the horn year and day unrelaxed after the denunciation; for which reason the law accounts him civilly dead, and so the superior wants a vassal, and therefore returns to the feu, during all the days of the rebel vassal's natural life.

Does liferent-escheat fall to all superiors?

Yes; if the vassal was infest.

What if the vassal has different lands, holding of different superiors; does this liferent-escheat fall to each of them?

Yes; it falls to each superior *quoad* the lands holden of himself.

Is there any other escheat than liferent-escheat?

There



There is another, *viz.* single-escheat.

To whom does it fall due?

To the king, and also to the lords of regality; if the person denounced live within the regality; because ordinarily the single-escheats are gifted at the erection; but if they are not, then single-escheats fall only to the king: for it is as king, not as superior, that he has right to the single-escheat.

What is single-escheat; and how does it fall?

Single escheat is a right to all the rebel's moveables, which falls to the king, or lord of regality, through a person's being denounced rebel, and registred at the horn, within the shire, or regality, or other districts, in which he lives, and his lands lie.

If the person be denounced rebel at the market-cross of Edinburgh, and the horning registred in the general register, and yet live, and has his lands in another shire, does his escheat fall?

It is thought it will not; because the denunciation should have been at the market-cross of the head burgh of the shire, or regality, or other districts, in which he lives, and his lands lie. For otherwise, he does not know of the denunciation; which, if he did, he would prevent, unless he designed to continue in his rebellion.

How are these rights to escheat completed?

By pursuing and obtaining decret of declarator before the Lords.

Are

Are not these escheats affected with the rebel's debts?

Sometimes they are, and sometimes not; for that is regulated according to the priority of the debts and diligences, to the denunciation.

What are the common rules observed, in a competition betwixt the superior or donator, and the rebel's creditors?

These rules differ according to the nature of the escheat, as single or liferent.

What are the rules in a competition anent the single-escheat?

These rules may be comprehended under these heads: *1mo*, No legal diligence nor voluntary right for payment of any debts, after rebellion, will prejudice the king, or his donator. *2do*, If a lawful creditor for a debt, prior to the rebellion, complete his diligence before declarator of escheat, he will be preferred to the donator. *3tio*, Payment or delivery of goods for security, or in satisfaction of a debt prior to the rebellion, made before declarator, will exclude the donator: But no voluntary assignation, though for a debt prior to the rebellion, if granted after rebellion, although complete before declarator, will be good against the donator. *4to*, If the denunciation proceed upon a horning for a debt, the creditor, in that horning, will be preferred to the donator, and all other creditors, because his own diligence ought not to prejudice him.

What are the rules observed, in a competition

on betwixt a superior, and the rebel vassal's  
creditors, in *liferent-escheat*?

The rules may be comprehended under  
these heads: *1mo*, No voluntar infeftment af-  
ter denunciation, though the debt was prior,  
will be preferred to the superior or donator:  
but if the vassal was obliged, before denunci-  
cation, to grant infeftment; and if the infeft-  
ment be accordingly expedite, within year and  
day of the denunciation, then the creditor will  
be preferred. *2do*, No legal diligence will be  
preferred to the superior, except it was for a  
debt prior to the denunciation, and was com-  
pleted by infeftment, or charge, or signature,  
presented to the barons of exchequer, in case  
the king be superior, within year and day, al-  
beit the said legal diligence was deduced before  
denunciation.

Thus you have opened up, the constitution  
of heritable rights by charters and seifins, in  
the first section; and of the several kinds of  
holdings, the casualties due to the superior by  
each, and the nature and effect of these casual-  
ties, in the second section; let us next discourse  
of transmission of rights to singular succes-  
sors, &c.

S E C

## SECTION III.

*Of transmission of property to singular successors  
whereof dispositions, public and base rights  
To which is adjected, the method the vassal  
heir must take to make up his title to the fee*

**H**OW is the property of lands transmitted to singular successors?

The property of lands comes to be transmitted to singular successors two ways; 1<sup>st</sup>, Voluntarily, by disposition; and 2<sup>dly</sup>, Legally, by adjudication. But we shall only consider voluntary transmission by disposition, as only proper for our design.

What is a disposition?

A disposition is, a written deed, whereby the real right to lands and other heritable subjects, completed by investment, are disposed or transmitted from the disponent to another person, who is called a singular successor, because he succeeds by a singular title, and not as heir to the disponent; and, by this disposition, the right is made either a public or base right.

How are these rights distinguished?

They are distinguished by the manner of holding the fee.

What is a public right?

A public right is, when the disponent sells the lands, to be holden *a me, de superiore meo*; called a public right, because it is the more noble,



noble, being holden of the superior, and so presumed to be publicly known; and to distinguish it from private and base rights.

What is a base right?

A private or base right is, when the disponent sells the lands to be holden *de me*, the disponent, *et successoribus meis*; so called, to distinguish it from a public right, and because it is more latent and lower.

What are the essential parts or clauses in a formal disposition?

The necessary and essential clauses in a disposition are ten in number; and as follows, *viz.*  
*1<sup>st</sup>*, The narrative; wherein is narrated the disponent's right to the lands; and wherein is expressed the special cause for which the disposition is granted. *2<sup>dly</sup>*, The dispositive clause; which contains the thing disposed, and a transmutation of all right the disponent has to, and in favours of, the purchaser. *3<sup>dly</sup>*, An obligation to infest; and here it is to be noticed, that, in the obligation, the disponent ordinarily obliges himself to infest and seise the purchaser, both by public and private infestments, or one or either of them, as the purchaser pleases; and ordinarily with this declaration, that the one is always without prejudice of the other; and to grant sufficient writs for obtaining the purchaser infest, such as procuratories of resignation, and precepts of seisin, &c. *4<sup>tly</sup>*, The disposition contains a procuratory of resignation, for resigning the lands in the superior's hands, in favours, and for new infestment to

be given to the purchaser; and the procuratory contains an obligation upon the disponent to hold firm and stable every thing the procurator, thereby constitute, does, in relation to the said resignation. *5thly*, Then follows an assignation to the mails and duties, writs and evidents, of the said lands. *6thly*, The clause of warrandice, and relief of public burdens before the acquirer's entry. *7thly*, The clause of delivery of the writs. *8thly*, The clause of registration. *9thly*, The precept of seisin. *10thly*, The clause of subscription; the date and subscription of the party and witnesses.

What if the disponent sells the lands, to be holden by a public infeftment; how is the disposition to be formed then?

When that is the case, the disposition is just as when the disponent obliges himself to infeft the purchaser by double infeftments, only the clause, with respect to the base infeftment, is kept out; for there is no other difference, except the lands hold ward, and then there is no precept of seisin neither.

Is it needful, in such a case, *viz.* selling the lands to be holden publicly, that the disposition contain a precept of seisin?

Yes; it is very necessary: for though lands are disposed to be holden of the superior, yet it is either by resignation or confirmation, as the purchaser shall please for his best security; and therefore, if the purchaser designs to hold of the superior by confirmation, it is absolutely necessary that the disposition should contain

a precept of seisin; for otherways, it would not be confirmed, but he behoved to be infeft upon a charter of resignation; so that the precept of seisin is as needful as a procuratory of resignation. But here it is to be noticed, that there is an exception as to the burgage lands, being sold to be holden of the king, only by resignation; and the purchaser immediately upon resignation, without any further trouble or expence, is infeft by the bailie of the burgh. There is another exception as to ward lands; which, if sold to be holden of the superior, must be only by resignation; and there is no precept of seisin, because recognition may be thereby incurred.

What if the disponer sells the lands to be holden, by a base infeftment, of himself and his successors; how is the disposition to be formed then?

This disposition being equivalent to, and just the same with a charter, which, in effect, is a disposition, it may be formed as ordinary dispositions are; only the clause of infefting by a public infeftment, the procuratory of resignation, and clause of delivery, are to be kept out.

Is it needful that the disponer be infeft himself before he sells the lands?

Where the lands were disposed to be holden either by a public or private infeftment, it is absolutely necessary; for until he is infeft, the right of the lands in his person is not complete; and so, he can neither resign, nor yet give in-

sestment himself: Yet, nevertheless, the lands may be sold, although the disponent be not infest; but then, great care must be taken in forming the disposition, that the purchaser may be infest.

Well, let us suppose then, that the seller is not infest, and yet designs that the lands disposed should hold of himself; how ought the disposition to be formed, so as to be valid?

In this case the disposition, immediately after the dispositive clause, should contain an obligation upon the seller to procure himself infest and seised by his superior; and being so infest and seised, to infest and seise the purchaser, to be holden of the seller; and this needs no procuratory of resignation, or clause of delivery. But this is not a sure way; and the purchaser cannot be infest till the seller be infest.

Suppose the seller not to be infest, and that he sells the lands the ordinary way, to be holden by double infestments; how is the disposition to be formed then?

In this case, the disposition ought to bear, not only the clause obliging the seller to procure himself infest, and then to infest the purchaser, as in the last case; but also a particular assignation to the procuratory of resignation, and precept of seisin, contained in the disposition, in favours of the seller, by his author; that, by virtue of that procuratory, and the seller's disposition and assignation thereto, the purchaser may be infest, upon resignation in the seller's author's superior's hands; or by  
virtue



virtue of the former precept of seisin, and the seller's disposition and assignation thereto, the purchaser may be infeft, and thereafter confirmed by the superior's author; who, in this last case becomes the purchaser's superior.

I shall only propose one other case on this head, and that is; J superior, grants a charter to V, whereupon he is infeft, and thereafter sells the lands to D, to be holden by double infeftments: D, before he is infeft, sells the lands to H; H designs to hold the lands of J superior, but, nevertheless, wants to have his disposition containing all clauses requisite, that he may infeft as he pleases: How is the disposition to be formed in this case?

The disposition ought to narrate the charter by J to V, and his seisin thereon; and the disposition of V to D; and, after the dispositive clause, it ought to bear, either an obligation upon D the disposer, to procure himself infeft, by virtue of the precept in V's disposition to him, and thereafter to infeft H the purchaser by double infeftment, *viz.* to be holden of himself, or of V his author, and to contain a procuratory of resignation, and precept of seisin; or, also, it ought to bear a special assignation to the precept of seisin in V's disposition to D; that, in case the purchaser incline to hold only of V, he may be infeft by virtue of his precept of seisin, and D's disposition and assignation thereto: and also, it ought to bear a particular assignation to the procuratory of resignation thereto by D; in case H inclines to

hold of J the superior, the lands may be resigned in J's hands, in favours, and for new investment to be granted to H and his heirs: and then the disposition ought to contain the other necessary clauses, that H the purchaser, as he designs, ought, for his own security, to compone with J the superior; and upon the resignation above-mentioned, gets a charter of confirmation from J, and confirmation of his own and author's rights, with a novodamus; and, by virtue of the precept of seisin in this charter, get invest, and hold of J his superior.

Does the superior's confirmation of a base investment make it a public right: and does the person whose right is confirmed, thereby become vassal to the superior confirming?

The confirmation of a base investment, neither makes the right public, nor the person, whose right is confirmed, the superior's vassal: for no right can be a public right, but that which is holden of the superior; nor no person vassal to the superior, but he who holds immediately of the superior; and his confirmation of a private or base right, does not alter the nature of it, which is distinguished by the holding, but only confirms it as it is, and the disponent still remains vassal to the superior, as well after as before the confirmation; wherefore the superior gets the casualties from him, and these of the ward, non-entry, marriage, and relief, through his death.

What is the effect then of a confirmation of a base investment?

The

The effect of it is, that, as the superior thereby acknowledges the sub-vassal's right, it secures against the casualties falling due to the superior *ex dilecto* of his immediate vassal, recognition, forfeiture, life-rent-escheat, &c. but not against the ward, non-entry, marriage, &c. as I have already said.

Does the confirmation of a feisin *a me*, taken upon the precept of feisin in the seller's disposition, make that infeftment a public right?

Yes, it does; and thereby the vassal becomes immediate vassal to the superior confirming.

What is the effect of such an infeftment not confirmed?

It is null till it be confirmed; and when it is confirmed, it becomes valid from the date of the feisin, though long before the confirmation, for such confirmation is of a retroactive virtue and force; yet the lands may be carried off by a mid impediment intervening.

Though this be a digression, pray tell me, is a superior obliged to receive a singular successor to be his vassal?

No, he is not; and, if he does, it is always upon paying a composition, which is ordinarily a year's rent: but a superior will be obliged to receive an adjudger, in obedience to the charge of horning on his adjudication; but then the superior gets a full year's rent of the

the lands, or a composition, for changing his vassal \*.

Is there a composition due from every adjudger?

Yes; every adjudger is obliged to pay a year's rent to the superior, before he can be received his vassal: and the adjudgers get allowance of the composition, and expences of infestment, &c. in their decret of adjudication.

I shall suppose, that the charter by the superior, is to the vassal, and his heirs, and assignees; will not the superior be obliged to receive the singular successors?

Suppose the case, as you state it, yet the superior cannot be thereupon compelled directly to receive a singular successor's assignees, being only meant, such assignees to whom the charter or disposition should be assigned before infestment thereupon: See *Stair's inst. tit. Disp.* 13. p. 387. But a superior having accepted of a resignation *in favorem*, there lies upon him a personal obligation to infest the person, in whose favours the resignation is made; yea, (as Craig observes) the Lords, upon application without citation, will grant letters summarily

\* By 20th George II. *For abolishing ward-holdings*, the legislature looking upon vassals as proprietors, and not merely as beneficiaries, has directed superiors to enter all singular successors, who shall have got from the vassal a disposition, containing procuratory of resignation; they always receiving the fees or casualties that law intitles them to, on a vassal's entry; *i. e.* a year's rent.



upon sight of the instrument of resignation, and warrant thereof, to charge the superior to sequester the party in whose favours it was made, who may not receive another resignation, or sequester any other party; or else his obligation may make him liable to the obtainer of the first resignation, *pro damne et interesse*; Stair's Inst. p. 386.

Now we shall speak with respect to the heir, how he makes up his title.

When the vassal dies, what method must the heir take to make up his titles to the property of the fee?

He must get a precept of *clare constat* from the superior, which stands in place of a special service; and, by virtue thereof, the heir may be sequestered, and so have the full right of the fee vested in his person.

What is a precept of *clare constat*?

A precept of *clare constat* is, a written deed, whereby the superior acknowledges, that, by authentic instruments and documents, it is made clearly evident to him, that the heir's predecessors died last vest and seised at the public faith and peace in the lands; and that the obtainer of the precept is his nearest and lawful heir, and of lawful age, and how the lands were held by the vassals who died infeft; and therefore he gives a warrant to his bailie, to infeft the heir; which warrant is just a precept of seisin.

But what if the superior will not give the heir

heir his precept of seisin, in order to be infefted, what course must the heir take then?

He must purchase brieves out of the chancery, serve heir in special to his predecessor who died last infeft; and, upon retouring the special service to the chancery, the director will give the heir a precept in the king's name, directed to the superior, commanding him to infeft the heir in the lands contained in his special service; and, if he delays or refuses, the heir takes with him a notary-public and witnesses, and goes to the superior, and offers him the casualties, and a precept of *clare constat* to sign, under form of instrument: and, if the superior refuses to sign it, the heir returns the precept furth of the chancery, with the notary's instrument, and thereupon the director of the chancery will issue out a second precept directed to the superior, for infefting the heir, and so a third, wherein is this certification. That, if the superior comply nor, there will be precepts issued out, directed to that superior's superior, or to the sheriff of the shire, to infeft the vassal, and the sheriff seldom or never fails to give infeftment; but if he should, there will be precepts issued furth, directed to a blank person, as sheriff in that part, for giving infeftment\*.

\* But now in lands holden of a subject superior, the heir may, in place of the former tedious method of running precepts against the superior, obtain a warrant from the Session, for letters of horning, to charge the superior to receive him. 20th George II. chap. 50.

Does the superior refusing as above, get his casualty notwithstanding his contempt?

No; for now he loses all casualties during life; which Stair says, ought only to be extended to non-entry.

What if the superior be not infest himself, so cannot infest the heir; what must the heir do then?

The heir, in that case must charge the superior to enter within forty days; that he, being entered, may infest the heir?

What if the king be superior?

If the king be superior, the heir, upon rendering his special service, will get a precept, directed to the sheriff, or other judge-ordinary, to infest him. The sheriff-clerk must be necessary to the service.

## SECTION IV.

*Of Seisins and Resignations, whereof instruments in general.*

**WHAT** is an instrument?

Under the word instrument, in a law sense, is comprehended all things by which any thing can be instructed; but, in a circumscribed and narrow sense, an instrument is a writ made for the proof of any fact or deed; or it is a solemn and well ordered writing, made and given under the hand of a notary-public, duly authorised and admitted, for remembrance,

brance, and keeping us in mind of what was done?

Of how many parts does an instrument chiefly consist, and what are they?

Every instrument consists of two principal parts; *viz. First*, The substantial part; which contains the fact, and substance of the matter transacted. *Secondly*, The formal part; in which are expressed all the formalities of the instrument. The substantial parts of instruments are various, and differ as the particulars and business in hand require. The formalities with us are these; *1st*, The invocation is always preferred in all instruments of moment and duration, such as seisin, resignations, requisitions, premonitions, and consignations; and generally in all other instruments relative to real rights, but in no other instruments of less moment and which are only to continue and endure for a short time. *2dly*, The instrument is begun with the date, and year of his majesty's reign. Then *3dly*, The fact, and substantial part of the instrument is insert: After which, *4thly*, The instrument bears the parties concerned their requiring instruments from the notary upon what was done. Next, follows the place where these things were done; and even the *locus loci* is express when necessary. And next, the particular hour of the day in which the instrument was taken: And then, the witnesses names and designations present, before whom these things were done: and, to complete all, being extended in ample form, the notary adhibits



hibits his docquet and subscription, and the witnesses their subscriptions.

How many persons are there concerned in instruments?

There are, in all instruments, three persons principally concerned, besides the witnesses; viz. as in seifins, the superior, or his bailie; the vassal, or his attorney; and the notary: So, in resignations, there are the resigner, or his procurator; the superior, or his commissioner; and the notary. In intimations, the intimer, or his procurator; the person to whom intimated; and the notary.

Now let us speak of seifins and resignations: and first, as to seifins; how many kinds of seifins are there?

There are two; viz. seifins *propriis manibus*, and seifins given by the superior's bailie.

What is a seifin?

Seifin, which is defined to be possession, is, a public act or deed, by the superior, or his bailie specially constitute for that effect; giving possession of the feu to the vassal, or his attorney, by delivering earth and stone of the ground of the lands, in presence of a notary-public and witnesses, upon the ground of the lands, upon a lawful day, betwixt sun rising and sun setting; upon all which the receiver takes and requires instruments of the notary; thence called an instrument of seifin: which is so necessary, that, till it be taken, the right of the lands is incomplete; and a senocd disposition, with the first seifin, in a competition of rights,

D

will

will be preferred to the first disposition with the second infeftment; and, to complete all, these seifins must be registred within sixty days after date, else they are null as to singular successors.

How many particulars are there in a formal instrument of seifin?

They may be comprehended under the ten following; viz. 1<sup>st</sup>, The invocation, *In Dei nomine*. 2<sup>dly</sup>, The title. 3<sup>dly</sup>, The appearance of the vassal, or his lawful attorney, in presence of the notary and witnesses, upon the ground of the lands, having the warrant of the seifin. 4<sup>thly</sup>, The narrative of the warrant of seifin, as a charter, disposition, precept of *clare constat*, precept of retour, &c. 5<sup>thly</sup>, The delivery of the warrant to the superior or his bailie, whose warrant is secured, because his name is filled up in the blank of the precept of seifin; and the vassal's requiring infeftment. 6<sup>thly</sup>, The bailie's accepting of the precept, and giving it to the notary, to be read and published in presence of the witnesses; and the notary's doing it accordingly: and the precept of seifin must be insert verbatim in the instrument. 7<sup>thly</sup>, The bailie's delivery to the vassal, or his attorney, possession of the subjects disposed, by the proper symbols, as earth and stone for the lands, &c.; and ought to express the lands particularly referred to in the charter or disposition. 8<sup>thly</sup>, The vassal or attorney's requiring instruments of the notary. 9<sup>thly</sup>, The seifin must bear these things to be done upon the ground of the lands; the hour

of

of the day when taken; with the witnesses names and designations, before whom done. And 10thly, The notary's docquer, and his, and the witnesses subscriptions.

Why is the seisin given by the superior called a seisin *propriis manibus*?

Because the superior himself actually gives seisin, *ex propriis manibus*, to the vassal.

What is the difference betwixt a seisin *propriis manibus*, and the seisin given by the superior's bailie?

There is no difference as to the effect, for both are valid, if formally extended. But the difference between them in the form, is in the following particulars. 1st, In the narrative of the warrant, as charter, disposition, &c. must be insert, in a seisin *propriis manibus*; whereas in the seisin by the superior's bailie it is referred to, in the precept of seisin. 2dly, The delivery of the warrant to the superior, and requiring him to give seisin; the request must be thus, That the superior would, in implement, and in consequence of the charter, disposition, &c. proceed to the giving, *ex propriis suis manibus*, seisin to the vassal, or his attorney. 3dly, in a seisin by the superior's bailie, the precept of seisin is insert verbatim; but, in a seisin *propriis manibus*, it needs not: And, when the superior gives delivery of possession to the vassal, it is said, That, in consequence and implement of the charter, disposition, &c. the superior, *ex propriis suis manibus*, gave and delivered seisin to the vassal. And 4thly, The

instrument of seisin, *propriis manibus*, should contain this special clause, after the words *specially called and required*, in the close of a seisin by a bailie; "As also, the said A. D. in sign and token of the verity of the whole premises, has instantly subscribed this present instrument, place, day, month, year of God, and year of his majesty's reign, first above-written, before the witnesses above-designed, and hereto subscribing." And the superior, as well as the notary and witnesses, must sign the instrument. This additional clause is likewise requisite in an instrument of resignation *propriis manibus*, and both in the same words.

What are the proper symbols for the several subjects, whereof possession is necessary to complete the right, and which are not to be given *ex ipsa corporaliter*?

These symbols are various, and are as follows; *viz.* Earth and stone for lands; an handful of growing corn or stubble for parsonage-tithes; an handful of grass and corn for vicarage-tithes; clapp and hopper for mills; a penny money, and earth and stone of the lands whereout an annualrent is uplistable, is a symbol of annualrent; net and coble for a salmon fishing; hecks and lairs for a cruive salmon fishing; psalm book and keys of the church doors for patronages; hasp and staple for tenements within burgh, to the heir, and earth and stone to the singular successors; an oar and a penny for ferry-boats; a vessel full of water for a well;



well; a penny money for a salt pan; *verga justiciaria* for superiorities; acts of parliament and court-books for the office of a sheriff, steuart, bailie of bailiary or regality; a baton for military offices; a scroll book or copy for civil offices.

In what language ought a seisin to be wrote?

There is no special language to which we are tied in extending of instruments; and therefore, regularly, the seisin ought to be wrote in the same language with the warrant of it, whether it be Latin or English; for two different languages, in one and the same paper, seem very incongruous, and therefore it is avoided for congruity's sake.

Are instruments of seisin of themselves probative? that is, because seisins are absolutely necessary for completing the right; does the seisin of itself make the right valid, without any other document?

No; neither instruments of seisin or resignation are of themselves probative, because they are only *assertio notarii*, unless the warrant appears, as the precept of seisin, procuratory of resignation, &c. and then they are sufficient.

Now let us speak of resignations. How many kinds of resignations are there?

There are two kinds, *viz.* resignations *in favorem*, and resignations *ad remanentiam*; and both these may be made either *propriis manibus*, or by procurators, having procuratories for that effect.

How may these resignations be considered with respect to their effect and design?

They may be considered, 1<sup>st</sup>, as transmissi-  
ons or conveyances of real rights, at least as  
necessary concomitants thereto; such are the  
resignations *in favorem*: Or, 2<sup>dly</sup>, They may  
be considered as extinctions of real rights,  
such are the resignations *ad remanentiam*.

When are resignations *in favorem* execute?

Resignations *in favorem* are execute, when  
the disponent resigns the lands in the hands of  
the superior, in favours, and for new infest-  
ment, to be granted, either to himself and his  
heirs of tailzie, when he designs to tailzie his  
estate, or when he gets the holding of his  
lands changed by the superior; as when ward  
lands are resigned to be holden feu; or they  
are execute when the lands are resigned by the  
disponent, in the hands of his superior, in fa-  
vours of a third person purchaser; and this is  
properly a resignation *in favorem*.

Does an instrument of resignation *in favorem*  
fully denude the seller?

No; because as the purchaser's right is not  
complete till infestment, so the vassal till then  
is not fully denuded; and the second resignati-  
on, with the first infestment, will be prefer-  
red to the first resignation, with the second in-  
festment: for which reason also, the seller still  
continues vassal to the superior, as well after  
as before resignation, until infestment be given  
the purchaser; and, till then, the superior gets  
all his casualties of non-entry, ward, marriage  
life

liferent-escheat, &c. from the seller, and not from the purchaser.

What is the effect of a resignation then?

The effect of it is, that, the superior having once accepted of the resignation, there lies upon him a personal obligation to infest the purchaser; and thereupon he may either be infest immediately, or get out his charter of resignation, and be infest in virtue of the precept of seisin contained in it; which last is the most ordinary way, but the former is sometimes practised also; and, in burgage tenements, it is the common practice, as I told you before.

When are resignations *ad remanentiam* made and execute?

These are made when the vassal sells back the lands to the superior.

Wherefore are they called resignations *ad remanentiam*?

They are so called, not only to distinguish them from the former kind, but because the vassal or his procurator resigns the lands in the hands of the superior, or his commissioner duly authorised for that effect, *ad perpetuam remanentiam*; so thereby the right of property, or *dominium utile*, belonging to the vassal, is consolidated and established, with the right of superiority, or *dominium directum*, in the person, and in favours of the superior, *in perpetuum*.

Is an instrument of resignation *ad remanentiam* necessary for extinguishing the vassal's right?

Yes,

Yes, it is; for as a seisin is necessary for completing the vassal's right; so resignation is absolutely necessary for extinguishing the same, if he was infeft.

Needs the superior be infeft upon this resignation?

No; for he is infeft before, and his former infeftment revives upon this resignation, wherefore he needs not be infeft of new; and this instrument of resignation, being duly registrate, (which must be done within sixty days, in the general or particular register of seisions) is sufficient, but if it is not registrate, it is null.

What is the warrant whereon a resignation, either *in favorem*, or *ad remanentiam*, proceeds?

The warrant is a disposition, containing procuratory of resignation, or a procuratory *per se*, which has the effect of a disposition; but resignation *propriis manibus* may be made without a procuratory, only the disposition, as the warrant thereof, must be produced to the superior, and narrated in the instrument, and the party-resigner must, in that case, subscribe the instrument.

What are the symbols of resignation?

The symbols used in resignation, whether *in favorem*, or *ad remanentiam*, are staff and baton.

In what posture is a resignation to be made?

Resignation is to be made kneeling.

What is the reason of this?

Because thereby the superiority over the vassal



vassal is evidenced and acknowledged to the superior; and it is an essential part of the resignation, which therefore the instrument ought either to bear, in express words, *genibus flexis*, or, in general, with all humility and condign reverence as becomes.

Is it necessary that resignation be made on the ground of the fee?

No; it is not necessary, either for resignation *in favorem*, or *ad remanentiam*; for it may be done at any place where the superior may be got at any time lawful; but the place must be expressed in the instrument where-ever it be.

## SECTION V.

*Of redeemable rights, their nature, constitution, and extinction; whereof reversions, legal, and conventional, premonition, and consignation.*

**W**HAT is a redeemable right?

A redeemable right is the conveyance of a real right for a time, which returns to the disponent, upon payment of the sum for which these rights were granted; and are so called, because they may be redeemed or recovered by the disponent upon certain conditions, as payment, &c.

What are the special names or titles by which these redeemable rights are known?

They are wadsets, infestments of annual-rent, and infestments of relief; and a disposition

on containing a reserved faculty to alter at any time during the grantor's life, may also be classed among redeemable rights; as to which there is this difference, concerning the exercising of this faculty to alter, viz. That a reserved faculty to alter at any time in the disposer's life, without the words, *ac etiam in articulo mortis*, or upon death-bed, in a disposition made by the disposer to a stranger, or any who is not his apparent heir, may be exercised by the disposer on death-bed; but such a reserved faculty, in a disposition to his apparent heir, can be exercised only by the disposer in *liege pouslie*. Forbes inst. vol. I. par. 3. p. 11.

What is a wadset?

A wadset is a right, in the form of a disposition or alienation, whereby lands are impignorated or pledged for a security of a special sum, which right is completed by infeftment, like other real rights.

How is the grantor and receiver of this right called?

The person who grants it, is called the reverser; and he who receives it, the wadsetter.

How many kinds of wadsets are there?

Two, viz. proper and improper wadsets.

What is a proper wadset?

A proper wadset is that, wherein the wadsetter takes his hazard of the rents of the lands, for satisfaction of his annual rent, and pays himself all public burdens.

What is an improper wadset?

An improper wadset is that, wherein the grant-

er

r of the wadset pays the public burdens, and upholds the rent, and the wadsetter is at no hazard; but has the annual rents secure.

How does the disponent or reverser secure himself, that he may get the lands on redemption?

By getting from the wadsetter, either a particular letter of reversion, whereby the lands are declared to be redeemable from him upon payment of the sum then delivered, and annual rents thereof, or by a special clause of reversion, contained in *gremio* of the disposition or alienation; and both these express the place, and time, when, and where it is to be delivered, and in whose hands the same is to be so assigned, in case the wadsetter refuses to accept of the money. The letter of reversion, and all assignments, discharges, and cicks to the reversions, must be registrate within sixty days of the date, in the same manner as feifins, else they are null *quoad* singular successors. But a reversion contained in the body of the wadset-right need not be registrate, because they bear their ditty, in *gremia juris*; and the wadsetter can transmit his right no other way than he has it to himself: And bonds for making reversions, must be registrate within sixty days after the date of the feifin. And here it will not be improper to notice, that the reversions must be fulfilled (in case of redemption) in the very precise terms wherein they are conceived, for equipolents will not be sufficient, and they are

are *strictissimi juris*; wherefore great care ought to be taken in forming these.

Are reversions extended to heirs and assignees? *i. e.* Can the reverser's heirs or assignees redeem the lands on payment?

The terms of the reversion is the rule in that case; and unless they are expressed in the reversion, they cannot redeem the lands, but after, in order of redemption, is used; that is, after the reverser has duly premonished the wadsetter, and consigned the sums, it may be assigned.

Do reversions ever prescribe?

Being granted to the reverser and his heirs, and duly registred, they never prescribe.

Can these reversions be appriised by the reverser's creditors?

Yes; they may, and daily are, which is allowed for the good of commerce, and benefit of creditors.

How are infestments of annualrent constituted?

They are constituted by an heritable bond, containing procuratory of resignation, and precept of seisin, whereupon infestment follows; and whereby the creditor has, not only a personal obligation on the debtor for the sum lent and annualrents, but also has a real right to the lands for security of his money; can poind the goods on the lands for his annualrents, and so has a double security for his money.

What



What are the necessary clauses in an heritable bond?

They are comprehended under these ten following; *viz.* 1<sup>mo</sup>, A personal obligation for payment of the sum lent, against a certain time, under a penalty attour performance, with annualrent from such a time. 2<sup>do</sup>, An obligation to infest the creditor in a yearly annualrent, corresponding to the principal sum, upliftable out of the lands, at two terms in the year, during the not redemption; and ordinarily, by either a private or public infestment, holden blench. 3<sup>tio</sup>, A procuratory of resignation, for resigning the annualrent. 4<sup>to</sup>, An obligation to pay the annualrent at two terms yearly, under a penalty, called the termly failzie; and an assignation to as much of the rents, mails, and duties, as will pay the annualrent; and to the writs and evidents of the lands, for maintaining the right of annualrent, during the not redemption. 5<sup>to</sup>, A clause declaring, notwithstanding of the heritable security on the lands, yet, that it shall be lawful to the creditor to use all diligence, personal or real, against the debtor for payment, at any time the creditor pleases, without any preceding requisition. 6<sup>to</sup>, The clause of reversion: But this is ordinarily, and securer, in the procuratory of resignation, and precept of seisin. 7<sup>mo</sup>, The clause of warrandice. 8<sup>vo</sup>, The clause of requisition. 9<sup>no</sup>, The precept of seisin. And 10<sup>mo</sup>, The clause of subscription.

What is an infestment of relief?

E

An

An inſeſtment of relief is a real right to lands, &c. granted by a principal debtor to his cautioner, for ſecurity and relief of the ſums for which he ſtands bound with the principal debtor. But, by theſe, the cautioner cannot enter into the poſſeſſion of the lands until he be diſtreſſed.

What are the principal claſes in an heritable bond of relief, upon which inſeſtment follows?

The particular claſes, in an heritable ſecurity of relief to a cautioner, may be comprehended under theſe following; *viz.* 1<sup>ſt</sup>, The narrative of the bond, in which the cautioner is bound. 2<sup>dly</sup>, A perſonal obligation upon the principal granter of this right to warrant, free relieve, harmleſs and ſkaiſhleſs keep the cautioner, off, and from, payment of the ſums for which he ſtands bound as cautioner, with, and for, the principal, or of any part thereof, and of all damages or expences he may ſuſtain through his cautionry: And, for effectuating this, it may contain, 3<sup>dly</sup>, An obligation to pay the ſums to the creditor, againſt a certain time, and retire the bonds, &c. and procure diſcharges thereof to the cautioner himſelf, that he may operate his own relief. 4<sup>thly</sup>, An obligation, for further relief and better ſecurity thereanent, to inſeſt the cautioner in the lands, in real warrantice, ſecurity, and relief of his cautionry, by double inſeſtments. 5<sup>thly</sup>, A claſe declaring, that notwithſtanding of the real ſecurity and inſeſtment of relief, that it ſhall be lawful to the cautioner to raiſe all diligence,

gence, personal or real, upon either the personal obligation or heritable security, the one without prejudice of the other, as the cautioner pleases. *6thly*, A procuratory of resignation, for resigning the lands in favour of the cautioner, in real warrandice, security, and relief of his cautionry. In which procuratory, and immediately before the words, *acts*, &c. may be insert, *7thly*, A clause declaring, that the cautioner's entry to the lands, and uplifting the rents, is, and shall be suspended till he is distressed for the debt, or any part thereof; and that then, and not till then, he shall commence his entry, which shall be suitable and correspondent to the distress, and to continue thereafter, ay and until he be fully relieved; and that he, being relieved, shall relinquish his possession, and renounce, and overgive the lands to the principal debtor; for which effect, it might bear an obligation on the cautioner, by his acceptance of this infestment, so to do: and then follows the rest of the procuratory of resignation. Here let it be noticed, that though this last clause were omitted, yet, by the law, the cautioner could not enter into possession of the lands till distressed; and, being relieved, the infestment becomes extinct, and falls to the ground, as being implemented; *Erskine's inst. book ii. tit. 8.* Then *8thly*, An assignation to the rents, at least so much thereof as shall correspond to the distress, and damage, and expences thereby sustained, to be from thenceforth uplifted by him, and his

foresaid, till full relief: and an assignation to the writs, with an obligation to make them forthcoming, because they are ordinarily kept by the granter. *9thly*, The clause of warranty. *10thly*, The clause of registration. *11thly*, Precept of seisin. And *12thly*, The clause of subscription.

How many kinds of reversions are there?

Two; *viz.* Conventional and legal.

What are conventional reversions?

Conventional reversions are these made betwixt parties, in papers apart, or *in gremio juris*; as in wadsets, and annualrents, of which we have discoursed already.

What are legal reversions?

Legal reversions are these which arise from the law or statute, and not from consent, and require no other solemnity than what is requisite to the legal constitution of the right, whereupon they follow. Such reversions are competent, by law, to heritors to redeem lands adjudged from them by creditors, within ten years of the date of the adjudication, being a general adjudication by payment or consignation of the sums falling due by these adjudications; but if it be a special adjudication, the lands are only redeemable in five years.

How are these wadsets, and other heritable redeemable rights, destituted and extinguished; and how do they cease?

They are extinguished and cease, either by consent, called a voluntary redemption; or by law, that is, by using a legal order of redemption,



tion, and prosecuting a declarator of the same before the Lords of Session.

How is a wadset right destituted and extinguished voluntarily?

That is done one of two ways, *viz.* either by the reverser's granting a discharge of reversion, whereby the right becomes irredeemable, upon that discharge being registrate within sixty days, conform to act of parliament 1617; or a wadset is extinguished voluntarily by discharge and renunciation, and grant of redemption.

Is it necessary that the lands be resigned *ad remanentiam*, to divest the wadsetter; or is the discharge and grant of redemption sufficient?

No; a discharge and renunciation are sufficient to extinguish a wadset, where no infeftment followed; even when infeftment did follow, to extinguish it *quoad* the granter and his heirs; yet, if the wadset was given to be holden of the reverser, and the wadsetter thereupon infeft, he must resign *ad remanentiam*, in the reverser's hands, as his superior, that the wadsetter may be divested, and his right fully extinguished to all intents; and the instrument of resignation must be registrate within sixty days, but the reverser needs not be infeft of new in this case. (*See resignations ad remanentiam.*)

But what if the wadset be given to be holden of the reverser's superior, and the wadsetter thereupon infeft?

Then it is extinguished by a discharge and

renunciation, containing procuratory for resigning in the superior's hands, in favours, and for new infeftment, to be given to the reverser, that he may enjoy the lands free of the burden of the wadset right, as he did formerly before it was granted.

Must the reverser, in that case be infeft of new in the wadset lands?

If the reversion is not incorporated in the wadset right, he must; for, by the wadsetter's public infeftment, he becomes immediate vassal to the superior, and will so continue, till some other person be infeft: wherefore, in that case, it is not only necessary that the lands be resigned, but that the reverser be infeft of new for establishing his right; for then he comes to the fee as a singular successor.

Is the superior obliged to receive back his vassal, the reverser, upon redemption of the wadset lands, when he is only a reverser apart?

By our former law he was not, no more than he was obliged to receive a singular successor, for he was as such to the superior, although the wadsetter, upon the redemption, was obliged to denude. But, to prevent that, the disposer or reverser, when the lands were wadset to be holden of the superior, and when the reversion was not incorporated in the wadset, used to get a letter of regrefs, whereby the superior obliged himself to receive back his vassal, when he should redeem his own lands: and, even in that case, he was infeft of new, before he had a complete right to the fee

fee established in his person: and if the reversion was incorporate in the wadset right, the reverser needed not be infest of new; for the instrument of resignation, duly registrate was sufficient. But now, since the act 20th Geo. II. c. 50. the superior, though he does not grant letters of regrefs, must receive the reverser, on payment of a year's rent, if he produce a disposition from the wadsetter, containing procuratory of resignation. If, at executing the wadset, the superior has granted letters of regrefs, he will be obliged to receive him, without payment of the year's rent.

How are infestments of annualrent extinguished voluntarily?

They are extinguished by resignation or renunciation, and even by intromission of as much of the rents of the lands as will pay the principal sum and annualrents due by the heritable bond, because they are properly granted for security of the sums, and they being paid, the right becomes extinct, as is the case with infestments of relief; and therefore singular successors buying infestments of annualrent are not secure by any register, but must rest on the warrandice of the seller.

Is a discharge and renunciation, supposing it duly registrate, sufficient for extinguishing the annualrent, and good against singular successors, though the annualrent be not resigned? Or must the discharge and renunciation contain a procuratory of resignation *ad remanentiam*, and the annualrent be accordingly resigned

signed before the infestment of annualrent can be fully extinguished?

To the first part of the question, I answer, That a discharge and renunciation being duly registrate is, of itself, sufficient for extinguishing the infestment of annualrent to all intents, and is good even against singular successors; *Stair, tit. Infestment of annualrent, page 271.* And therefore there is as little use for a procuratory of resignation in a discharge and renunciation of an annualrent, as for an instrument of resignation, and the same is not absolutely necessary; but yet annualrents may be extinguished also by resignation, and when it is extinguished after that manner, the discharge should contain a procuratory of resignation.

How are infestments of relief extinguished?

They are extinguished, either by a discharge and renunciation, or by the principal debtor's payment to the creditor.

Is it necessary the discharge and renunciation be registrate, as infestments of annualrent?

No, it is not necessary; because infestments of relief, are only temporary rights, and for the cautioner's relief; and simple payment of the creditor, makes them become null and extinct to all intents, since the cautioner is thereby relieved and freed: neither needs the principal debtor be of new infest, because his former right revives; but yet it is not amiss to registrate it, that it may appear the cautioner is relieved.

You



You said formerly, redeemable rights were also extinguished and taken off by law, *viz.* by raising of a legal order of redemption, and prosecuting a declarator thereof before the Lords.

Yes; and this order of redemption, when the wadsetter of an annualrent will not voluntarily renounce, or when the heritor designs to redeem the lands adjudged from them within the years of legal reversion.

By whom is this order of redemption used?

The order of redemption is used, either by a person having right either to a legal or conventional reversion, or by a procurator for him, specially constitute for that effect, conform to a written procuratory in his favours.

How many parts are there in that order of redemption?

There are two principal parts in all orders of redemption, whether of conventional or legal reversions; which are, *1mo*, Premonition; and *2do*, Consignation; and these must be done in the very exact forms of reversion in conventional rights, for equipolent terms are not sufficient; and both must be by way of instrument of a notary, and not by a summons, or any other way; as was decided 23d July 1662, Lord Deskmentanon *contra* Hay, and 11th July 1623, Crawford *contra* Livingston, observed by Stair. But the contrary is now daily followed.

What is premonition?

Premonition is an act or deed, whereby the reverser, or his procurator, authorised by a legal mandate, or procuratory, premonishes the wad-

fetter, or annualrenter, or their heirs and successors in possession, by a legal title in their person *pro tempore*, conform to the tenor of the reversion, to appear at the place of consignation, and receive satisfaction conform to the reversion.

When and where must premonition be used?

I have already said, the rule of this is the reversion: but as premonition is generally upon forty days, in conventional reversions, they must therefore be used forty free days before the time of redemption; and, if the wadsetter or annualrenter be within Scotland, premonition must be made to him personally, or at his dwelling-house, if he has any; and his dwelling-place must be particularly designed, for a premonition, for want of this, was found null; 13th December 1626, Earl of Buccleugh *contra* Young. But if he be out of the kingdom, or have no fixed place of residence, letters of premonition will be granted by deliverance of the Lords, upon sixty days, for premonishing him to compear at the time and place stipulated by the reversion, and there to receive and implement in terms thereof.

What if the wadsetter or annualrenter be minor; how must the premonition be made then?

In that case, the premonition must be made to the minor himself personally, or at his dwelling-place, and to his tutors and curators, either generally, at the market-crofs of the shire or stewarty wherein the minor resides, or otherways

therways to them personally; as was found  
 17th December 1629, Lord Camhouse *contra*  
 Lord Futhmore; and that by way of instru-  
 ment, proceeding upon letters from the Lords;  
 and not by way of instrument without them;  
 15th June 1680, Gordon *contra* Earl of  
 Queensberry.

How are premonitions made, with respect  
 to adjudgers, for redemption of lands ad-  
 judged?

These premonitions must likewise be by  
 way of instrument, as also the consignation  
 thereof; but there is no determined time ap-  
 pointed by law on which premonition must be  
 made, nor a determined place where config-  
 nation must be made, nor the person of the  
 configner; but premonition may be on any  
 number of days sufficient for the consignation :  
 yea, as Craig and Stair observe, though it  
 were upon the same days of the consignation ;  
 and as to the other points, what is before said  
 of premonition, for the redemption of lands by  
 conventional reversions, is here to be observed  
 in legal reversions; only, in instruments of pre-  
 monition for legal redemption, the special time  
 and place of redemption must be condescended  
 upon, that the creditor may attend to receive  
 payment of what is due him. The proper  
 places to be condescended upon are the ad-  
 judger's dwelling-place, the grounds of the  
 lands adjudged, or the parish church within  
 which they lie, &c. But if the adjudger be  
 out of the country, that is, out of Scotland,  
 then

then letters of premonition will be granted by deliverance of the Lords, to premonish him at the market-cross of Edinburgh, pier and shore of Leith.

What is consignation?

When the time of redemption fixed by the instrument of premonition is come, the reverfer, or his procurator duly authorised, as said is, comes to the appointed place of redemption, with a notar and witnesses, and it is sufficient if he comes at any time of the day : and therefore if the wadsetter, or creditor, does not appear, or appearing refuse to renounce the particulars in the reversion, or the lands adjudged, and give up the wadset right, heritable bond, and decret of adjudication, abbreviate thereof, and grounds of the same, with a sufficient ratification thereof, containing all clauses requisite; then, and in either of these cases, after public reading of the reversion, procuratory, if there be any, and instrument of premonition, by the notary-public, in presence of the witnesses, at the place of redemption, the particulars contained in the reversion must be consigned in the hands of the particular person mentioned in the reversion, if any be named, and failing thereof, in the hands of some responsible person, upon the peril of the consigner. And if the wadsetter or creditor be absent, public intimation must be made, by calling him at the most patent door of the particular place; and all this must be done according to the reversion in conventional rights, in  
*forma*



*forma specificata*, and not *per equipolentes*. See Hope's wadsets, Lord Fraser *contra* Crichton. The consignation and order of redemption must be by way of public instrument, which ought to bear the haill order above-mentioned, and particularly, the production and reading of the reversion, and procuratory, and instrument of premonition, with the consignation in the redemption of legal reversions, and the *locus loci* where the consignation was made in both; and these orders of redemption being used, the same are effectual by a process of declarator of redemption, at the instance of the user of the order, against the wadsetter, annualrenter, or adjudger; whereby the Lords will force him to renounce and declare the lands redeemed: after which decret of declarator the lands are redeemed and belong to the redeemer. See *Stair's inst. lib. ii. tit. 10. Erskine's inst. book ii. tit. 8.*

F

PART

## P A R T II.

## Of PERSONAL and MOVEABLE RIGHTS.

**W**HAT is a personal right?

Personal rights are these which bind only the granter, and his heirs, and not singular successors, nor the granter's lands; such as obligations, bonds, bills, assignations, translations, &c.

## SECTION I.

*Of obligations principal and accessory, bonds, contracts, tacks, rentals, &c.*

**W**HAT is an obligation?

An obligation is defined to be, a legal tie, whereby we are bound to pay, or perform any thing to another person; some whereof require writ to make them binding, whereas others require only writ for probation; *i. e.* cannot be proved without the writ, though they be valid and binding without it; such as, in the first case, an obligation to grant a disposition of real rights, or lands, and the like; and, in the second, bonds, or obligations for borrowed money, &c. and the like. And there are other obligations that do not require writ

at

at all; but these we shall pass, as foreign to our purpose, and consider written obligations. But those are various according to the circumstances of one's affairs, and differ according to the agreement of parties.

How many kinds of written obligations are there?

There are two kinds, *viz.* Principal and accessory obligations.

What is a principal obligation?

A principal obligation is that, wherein the person, or persons, principally concerned, are only bound.

What is an accessory obligation?

An accessory obligation is that, wherein some other person, or persons, than those principally concerned, are bound for the principals, or together with them, called upon that account cautioners, and the obligation called, a bond of cautionry; or, a bond with principal and cautioner.

What is a tack?

A tack is a location or contract, whereby the use of any thing is set to the tacksmen by the proprietor thereof, as the consequence of his property, for a certain hire, called the tack-duty.

What are the necessary clauses of a tack?

The necessary clauses of a written tack are, 1<sup>st</sup>, The parties contractors their names and designations. 2<sup>dly</sup>, The set, or let of the lands, by the heritor to the tacksmen, for a certain specific term of years, which must contain the

term of entry. *3dly*, A clause of warrandice, by the heritor to the tacksmán, to warrant the tack. *4thly*, An obligation on the tacksmán to pay yearly a certain tack-duty, or rather services, or both, for the use and benefit of the lands, and this sometimes under a penalty. *5thly*, An obligation on both parties to perform the premises to each other, under a certain penalty, attour performance. *6thly*, The clause of resignation and subscription.

What is the effect of the tack, with respect to the tacksmán?

The effect of it is, that, by virtue thereof, the tacksmán has right to possess the lands; and, being entered into possession, which completes his right, he cannot be put out of it by any singular successor, during the years thereof to run: for it will defend against any buyer, providing the tacksmán duly pays his tack-duty.

Does the tack defend against the superior's getting right to the lands by the casualty of non-entry?

No; it will not defend the tenant in this case, for the superior may remove him at next term; but then the tack sleeps during the time that the lands are in the superior's hands by the non-entry; and when these are expired, the tack revives, and the tenant returns to, and does possess the lands during the years of the tack that were to run, when the superior entered into the lands by the non-entry. *Erskine's inst. book ii. tit. 6. and 11.*

Can



Can the tacksmen assign the tack, or sub-set the lands?

If the principal tack be granted to the tacksmen, and his heirs, and assignees, and sub-tenants, then he may do either; but if assignees, or sub-tenants be not express, he can do neither; and if he do, the assignation, or sub-set of the tack is null *ipso jure*, as proceeding *a non habente potestatem* \*.

When the tack expires, and the tenant inclines to remove; what must he do to be free of his possession?

He ought, in Craig's opinion, 268. 3. to give a written renunciation thereof to his landlord forty days before the term of Whitsunday, at, or immediately preceding the ish; but renunciations are now seldom reduced into writing, when they are not to have effect before the ish.

\* It is not a fixed point, whether a tacksmen may sub-set the lands without an express power of subsetting; Lord Stair, 2. 9. 22. and M'Kenzie *b. t.* affirm, he cannot. But it was adjudged, Harc. 955, that he might, even where the tack excluded assignees *per expressum*; far more ought he to have this power, where the exclusion of assignees is only implied.

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THE  
ORDER AND FORM  
OF  
SERVICES before the MACERS:

AND

METHOD of obtaining INFESTMENT thereon.

**W**HEN a person, possessed of heritable subjects, dies, without making any disposition thereof in his own lifetime, the method of making up titles thereto varies, according as the defunct was infest in the same or not.

If the defunct was never infest therein, the heir needs no farther title to complete the right in his person than a general service.

But if the defunct was infest, then the person, called by law to the succession, must be served heir in special, in such lands, heritable bonds, &c. as his predecessor was infest in, and thereupon must also be infest himself, except where the lands, &c. hold of a subject-superior; for, in that case, the subject-superior commonly grants a precept of *clare constat*, which saves the trouble of expeding a special  
ser-

service; and upon that precept of *clare constat* the heir must be infest. And this method of entering by precept of *clare constat* is always followed, where the lands hold of a subject, because thereby the expence of the special service is saved, which is very considerable: for the distinctions laid down in our law books, of a precept of *clare constat* being not an universal sufficient title, seems of very little use in practice.

These services proceed upon brieves directed furth of the chancery; or when regalities were erected with chapel and chancery within themselves, (but which last is now abolished by *20mo Georgii 2di.*) upon these brieves directed furth of such regalities; which brieves are a warrant to the judge-ordinary to enquire, by a jury, into the truth of the points contained in the brieve; which are so fixed and known, that it is needless here to take notice of them: Only it may be observed, that whether a general or a special service be intended, the brieve is still the same; although, in a general service, there are no more than two of the heads answered; *viz.* That the defunct died at the faith and peace of the king; *i. e.* That he was never guilty of high treason; and that the raiser of the brieve is next and lawful heir: It is commonly added also, that he is of a lawful age; though it seems of no consequence whether it be added or not.

In special services the whole heads of the brieve must be answered; as will be more particularly



cularly seen from the example of a special service after set down.

A general service may be expedite before the macers, or any sheriff, steward, bailie of regality, bailiary, or burrow; whether the defunct or heir have their lands or residence in any of their jurisdictions or not.

But a special service regularly should be expedite before the judge-ordinary, within whose jurisdiction the subject is situate, to which the heir is to be served: And where the subjects are several, and lie in different jurisdictions, the service ought to be expedite before each of the judges thereof, for the respective subjects lying within their jurisdictions. But though this be the regular way, the Lords of Session have been in long custom to grant commissions to their macers, as judges in that part of the jurisdiction where the subjects are situated, to this special effect, that the service of a certain person may proceed before them. And altho' there was an act made, Jas. V. p. 6. c. 80, to represent this in some measure, yet it is entirely neglected and gone into desuetude; for a warrant for that purpose passes of course by the Ordinary on the bills, and is generally desired where the subjects lie in different jurisdictions, to save the expence of different services.

It may be noticed, that, by a decision observed by Haddington, 20th June 1626, Johnston *contra* Maxwell, it seems found, that a service, before the sheriff, to lands within a stewardry is null. But by another decision,  
marked

marked by him later, viz. No 1247, of his collection, when joined with 5th June 1606, L. Baillie, also marked by him, the contrary seems found, as to a service, before the sheriff, of lands within a Regality; and in these this point is pretty well argued.

The writers to the signet are the only persons who can be clerks to these services before the macers, by statute Ch. II. p. 2. f. 3. c. 16. And as titles to the greatest estates are commonly made up in that way, it will be of use in practice to set down forms of these services.

Here it may be fit to notice, that services of lands, holden of burgage, are never expedited before the macers, but always before the bailies of the burgh; they having a particular form of their own, of cognoscing by hasp and stapple, as it is called: At the same time with which cognition, they give investment; and the clerk of the burgh must be notary thereto, by act of parliament.

In expediting services, whether special or general, care must be taken to serve the person heir to the proper predecessor; and that is, to the person in whom the fee was last duly vested.

For an example of this; A disposes certain heritable subjects to B, in liferent, and to C and his heir, in fee; whom failing, to the heirs of B. We shall suppose C, and his heirs fail, whereby D, heir to B, is called to the succession: now, he is to serve himself heir of provision to C, and not to B; although he is called

ed to the succession, as heir designative to B, because C was last in the fee. And if C had had a son named F, who had been served heir to his father, and then died, D, in that case, would serve heir of provision to F, because the right was last vested in his person. And great care ought to be taken, to serve an heir to the proper predecessor, and not to pass by any one in whom the right may have been last vested, either by disposition or service; for, in this case, if D were to serve heir to C, without noticing F, his service would be void: but if F, though surviving his father, had died before expeding a service, then D would serve heir to C, without regarding F, as the right was never properly vested in his person.

Few mistakes of this kind happen in special services, because it is always easy to know who was last in feft. But sometimes in general services, people are most apt to commit mistakes, by serving heir to the person, in whose favours the disposition, &c. was originally granted, without noticing the intermediate predecessors, who may have had right, either by general service, or voluntar conveyance. And therefore, before expeding any such service, the defunct's papers ought carefully to be searched, and even the records of chancery, where the subject is of consequence, to prevent any mistakes, which are so ready to happen.

The next thing that is to be considered by a writer, who is to make up a gentleman's titles to his estate, is, whether a general or special service

service be required. At first one would think there would be no great difficulty in this point. For if, as is already said, 'tis a general rule that, where the defunct is infeft, the heir must have a special service; and, where he was not infeft, the heir may take up the right by a general service; nothing further is necessary than to enquire whether the defunct is infeft or not: yet it is to be observed, that this is only a general rule, in the case where a superior disposes to one, whom he truly designs to retain for ever as his vassal, and gives out his lands to be holden feu, &c. only *de me*: But where this vassal disposes to a sub-vassal base or *de se*, and the precept of seisin relates to neither, and there is a procuratory of resignation in the disposition, there, although the sub-vassal be infeft on the precept, which, till confirmation, is constructed as a base infeftment, (but only for the sub-vassal's advantage, that it might not, till that time, be null, which it would be, if constructed a public infeftment, for by no means is there a base perpetual sub-vassalage intended, else even confirmation would not render it public); yet still, as the procuratory of resignation would be executed, the sub-vassal's heir may either make up his titles by a general service, and resigning on the procuratory; and thereafter, to denude his predecessor of the right of property, which stood in his person by the base infeftment taken in his favours; and to consolidate the same with the right of superiority thereof, which



he takes up by the infeftment on the procuratory of resignation, grant to himself a precept of *clare constat*, in that sub-vassalage, and take infeftment thereon, which will effectually consolidate both in his person; or he may procure the superior to confirm his predecessor's base infeftment, which will render it public, altho' granted after the death of the person infeft, and then may take up the lands by a special service, as heir to his predecessor.

The first method is to be chosen when the lands hold of the crown, as being of much less expence. And the last method is commonly followed where the lands hold of a subject superior; who, at the same time that he confirms the predecessor's infeftment, also grants precept of *clare constat* in favours of the heir, both on the same sheet of parchment; and the heir is thereupon infeft, which completes his title.

Upon this head also it may be observed, that it happens frequently, that one, who has right to lands to himself, and certain series of heirs, and stands infeft in them accordingly, before his death, grants a disposition thereof to another series of heirs: now, though here the defunct was infeft, and so, according to our general rule, a special service would seem necessary, yet, as the infeftment is not to these heirs to whom he has disposed, so 'tis impossible they can be served heirs in special in the lands: But the way they have to make up their titles, is, to serve heirs in general, in order to make

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up

up a title to the disposition, and then, either infest on the procuratory of resignation, or on the precept of seisin, as they think proper; or, if the first series of heirs have (before they can get that done) taken up the lands by a special service, the second may raise an action, on the passive titles, against them, to denude; and, thereafter, adjudge in implement, and, for security, instantly inhibit on the dependence.

Another case sometimes occurs, which may be here mentioned; and it is this: A fiar infest, disposes his lands to his heirs-male, (without mentioning to himself and his heirs-male, as is usual), whom failing, to A B, with procuratory and precept: The heirs-male fail; *Query*, How shall A B make up his titles to this disposition? The difficulty of serving heir in general of tailzie, &c. is, That the defunct was not fiar in the disposition; so that the heir who serves cannot properly take it up by a general service, because the right to be so taken up was not in the disponer's person. This flowed from an inaccuracy in stile; for the fiar should have disposed to himself, and his heirs-male, whom failing to A B. Some lawyers thought, that, as the lands held of the crown, a charter of resignation might be taken to A B, which would pass *periculo petentis*, and be good; but that a service was not competent: Others again thought, that a general service was competent to carry that disposition, and necessary, so as it might be made appear that the heirs-male had failed; and that the disponer, notwithstanding

standing that he dispones to heirs-male, still continues *fiar*. For during his lifetime he could have no heirs-male; and as the fee cannot be *in pendente*, it must remain with himself: So that A B, to make up a title to that disposition, ought to serve heir of provision in general to the disponer, and thereby carry right to the disposition; and either upon the procuratory or precept he may obtain himself *infeft*. But that it was impossible that A B could pass a charter upon that disposition, which would be ineffectual, unless upon a general service; and that, though it might pass the exchequer, as any thing will do, it certainly would be good for nothing: And this opinion was followed as most secure; and, before taking the charter of resignation, A B was served heir-male in general to the disponer: and though the special service might have been competent, as the estate stood to heirs-male, and A B was heir-male; yet it was shunned, because of the by-gone non-entry duties, which were great.

When a person is to be served heir, whether in general or special, he must either attend the service, and sign the claim himself, or he must grant a procuratory specially for that effect, otherways no court will expedite a service in his favours, because of the danger of bringing an heir under an universal passive title, which no court will do, but upon the heir's own consent; and no general factory will be sufficient.

The form of the procuratory follows: only we may observe, that there we suppose, the case of an heir to be served, who is clogged with no tailzie; but, where there appears any difficulty, the way and manner of taking notice of the tailzie, and inserting the conditions, &c. shall be set down.

*Procuratory for serving one heir-male to his predecessor.*

**I** J. H. of A. eldest lawful son of the deceased J. H. of A. hereby constitute  
and each of them jointly and severally, to be my procurators and attornies; with full power, warrant, and commission, for me, and in my name and behalf, to purchase, and procure me duly and lawfully served nearest lawful heir-male of the body of the said deceased J. H. of A. my father, in special, in all and sundry lands, heritages, annualrents, and others, wherein my said father died last vest and seised; and to procure such service duly returned to the chancery; and thereafter to obtain me duly and lawfully in-vest and seised in such lands and estate: and thereupon, and upon all and sundry the premises, to ask and take instruments and documents, one or more; and generally all and every thing thereanent to do, which I might do myself if personally present. Ratifying hereby, and holding firm, all and whatever things my said procurators shall lawfully do, or cause

to .



to be done, in the premises. And for greater security, I consent, &c.

*N. B.* This must be wrote on stamp paper.

Having got this signed in common form, the next step is, that the writer draws a bill to the Lords, for a commission to the macers; which runs as follows.

*Bill to the Lords, for a commission to the macers.*

**M**Y Lords of Council and Session, Unto your Lordships shews your servitor J. H. of A. eldest lawful son of the deceased J. H. of A. That I am to raise brieves furth of our sovereign Lord's chancery, for serving me nearest lawful heir-male of the body of the said deceased J. H. of A. my father, not only in general, but likeways in special, in all and sundry lands, heritages, annualrents, and others, wherein my said father died last vest and seised, as of fee, at the faith and peace of our sovereign Lord, lying within the sheriffdom of L. and R. and regality of &c. respectively. But that in regard separate seissins within the said different jurisdictions are chargeable and tedious, and several questions and debates may arise anent the serving of the said brieves, which cannot be so well determined before the sheriffs of the said sheriffdoms, or their deputes, That therefore necessary it is to have the said brieves served before your Lordships four ordinary macers, or any two of them jointly, as

sheriffs, &c. for that effect, of the said respective sheriffdoms of L. and R. &c. and that within the parliament or new session-house of Edinburgh, as the most fit and convenient place, where all parties having, or pretending to have, interest, may be heard to oppone or object; and any doubts which may happen to arise may be best resolved and determined. Herefore, I beseech your Lordships to grant warrant to the director of his Majesty's chancery, and his deputies, to emit and direct furth of the said chancery, a commission, under the quarter seal, (otherwise called, the testimony of the seal, to be made use of within Scotland, in place of the great seal thereof), in due and usual form of chancery; making, constituting, and ordaining the said four ordinary macers before your Lordships, or any two of them jointly, sheriffs or bailies of regality, &c. for that effect, of both, and each of the said sheriffdoms of L. and R. And giving, granting, and committing to them, or any two of them jointly, as said is, his Majesty's full power, and special command, to sit within the said parliament or new session-house of Edinburgh, for serving of the said briefes: And, for that end, to receive, open, and cause duly proclaim the same; and to begin, affirm, and fence courts one or more, and, if needful, to continue the same; and to make, constitute, and ordain clerks, serjeants, officers, dempsters, and all other necessary members of court, for whom they shall be answerable; and to chuse a sufficient number of persons

sons of inquest, most proper, and least suspected, and who best know the verity of the matter, and cause them appear accordingly, and pass upon the inquest of the said briefes, each person under the pain of *L. 40* Scots money; and generally all and every other thing requisite and necessary, in and anent the premises, to use and exerce, as fully and freely as the sheriffs of the said sherriffdoms might have done therein themselves respectively, if the said service had been led and deduced by, and before them: And that your Lordships may admit and declare the said parliament, or new session-house of Edinburgh, to be as lawful and sufficient, to the effect foresaid, as if the same were the tolbooth, or other usual court place of the respective head burghs of the said sherriffdoms of *L. and R.* And may likewise dispense with the time of vacance, if any such shall happen to be during the time of the said services; and to declare the same to be equally good and sufficient, as if done in lawful time of session. According to justice, and your Lordships answer.

This is signed by a writer to the signet.

On the back of this bill is written by the under-clerk, *Apud Edin. Decem. fiat ut petitur*; dispensing with the place and time of vacance; which is signed by a Lord and a clerk.

Upon giving this into the chancery, the party obtains a commission to the macers, which is not necessary to be here set down, as it is not wrote by a writer to the signet, and besides, it is

is almost wholly the bill turned into Latin ; only it differs in this, that the place appointed to the macers to meet in, is, *infra pratorium nostrum de Edin.* which is declared as lawful, *ac se esset pratorium capitalium burgorum, dict. vicecomitatum* ; and the jury is pointed out to be *personarum dignarum, &c. infra bondas et jurisdictiones predict. habitant. et quatuor dis-medietatis circumjacent* ; though the first of these is contrary to the warrant of the commission, *viz.* the Lords bill, and contrary to the retour ; and scarce a reason can be assigned for the second : Both are in disuse, and the second was beginning to be so even in Craig's time, *lib. ii. p. 28.* The commission goes on, and bears a warrant to all persons to obey the macers, as sheriffs of the said sheriffdoms, under all pains competent : and it bears to be given under the testimony of the seal ordained to be used, &c. at Edinburgh, of the date of the deliverance of the bill ; and, *ex deliberatione Dominorum Concilii et Sessionis* ; and bears, on the back, to be written and sealed, &c. (as all writs that pass the seal do) by the director of the chancery.

Thereafter, the commission is taken to an under-clerk of session, that the macers may accept, and give their oaths *de fidei*, before the Lord Ordinary ; this they having done, that under-clerk writes on the back of the commission, as follows ; " At Edinburgh the      day  
" of      years, The which day, in presence of  
"      one of the Lords of Council and Sessi-

" on



“ on, compeared J. G. &c. the four ordinary  
 “ macers before the said Lords, and accepted  
 “ the within commission, and gave their oaths  
 “ for their faithful administration of the brieve  
 “ and office thereby committed to them; where-  
 “ upón H. C. writer in Edinburgh, asked, and  
 “ took instruments in the hands of A. F. one  
 “ of the under-clerks of session. (Signed)  
 “ A. F.”

Together with this commission, there are given out to the party from the chancery, as many brieves as there are sheriffdoms or other jurisdictions, within which the lands to which he is to be served lie. The form of the brieves is so well known, that 'tis needless to copy them; only it may be observed, that the direction runs, *Georgius, &c. Dilectis nostris quatuor clavigeris ordinariis, coram Dominis nostris Concilii et Sessionis, vel quibuscunque eorum duobus conjunctim vicecomitibus nostris vicecomitatus de L. in hac parte, specialiter constitut. virtute commissi- onis, sub testimonio sigilli, inibi specificat. solut. mandamus, &c.* The only heads of the brieves in which there occurs any variation are the two first, which must be adapted to the different cases that occur: And the first head, after in *quibus terris, &c. J. H.* instead of *pater lateris presentium*, which would follow in the present case, will often be insert, *avus, proavus, frater, &c.* as the case is: And instead of the second head, which, in the present case, would be, *et si dict. J. H. sit filius legitimus, natu maximus, et legitimus, et propinquior heres masculus dict.*

*dict. quondam J. H. sui patris, &c.* if the succession come by line, it will run simply, *si sit legitimus et propinquior heres dict. &c.* But if it come by provision of infestment, given to a man and his wife in conjunct fee, and the heirs to be gotten betwixt them, it is said in the brieve, *si sit legitimus et propinquior heres ejusd. quond. J. H. inter ipsum et suam sponsam procreatus, de dict. terris, &c.* And if the succession comes by tailzie, to the end of the article, directed in the case of an heir of line, is added, *ratione tailie*; or if 'tis by provision, *si sit legitimus, &c. heres provisionis*: And the chancery make out the brieve conform to a note given to them by the writer for that purpose. Those who chuse a general retour, beside the special one, will be obliged to take out another brieve for that purpose, because every service must have a brieve annexed to it, when returned to the chancery; but that will differ in nothing from the others; for altho' the retours differ, and that the one is general, answering only some of the heads, and the other special, answering all the heads of the brieve, yet the brieves are still the same.

From what has been already said, an observation will occur to every one, that there is no vestige here of the macers having any jurisdiction *qua* macers; every thing points to the contrary; they are but judges by commission, and *qua* sheriffs in that part: and it would seem the king can give his jurisdiction to whom he pleases; neither is it any argument to the con-

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trary, that advocation of services to the macers are often passed by the Lords. For such advocations are still only passed to them *qua* sheriffs in that part. *Vide* the stile of such an advocation, *Dallas*, p. 486, and 487. and *Stair lib. iv. tit. 3. § 18.*

The next thing to be done is, that the macers proceed to execute their office: And tho', *de praxi*, the whole acts of court are commonly wrote together, yet it will agree more to order to write them here separately.

But before setting down the forms, it seems needless to tell the manner of procedure, because it will appear from the acts themselves.

*Courts of the service of the brieves issued furth of his Majesty's chancery, at the instance of J. H. of A. for serving him nearest lawful heir-male of the body of the deceased J. H. of A. his father; holden within the parliament or new session-house of Edinburgh, in the manner after-mentioned, the days after specified, viz.*

**A**T Edinburgh the      day of      years, and within the parliament or new session-house of Edinburgh, Compeared personally J. G. &c. the four ordinary macers before the Lords of Council and Session, as sheriffs of the several sheriffdoms of      and      specially constituted, to the effect after-mentioned, in virtue of his Majesty's commission after specified; and also compeared A. C. as one of his pro-

procurators, specially constitute by the said J. H. of A. eldest lawful son of the said deceased J. H. of A. and produced his Majesty's commission, by deliverance of the Lords of Council and Session, and past under the testimony of the seal appointed, in consequence of the union of Scotland and England, to be made use of in Scotland, in place of the great seal thereof, making, constituting, and appointing the four ordinary macers of session, or any two of them jointly, sheriffs of the two sheriffdoms before specified, for serving the two brieves (to be issued forth of our sovereign Lord's chancery, for cognoscing the said J. H. nearest lawful heir-male of the body of the said deceased J. H. his father), in special, in all and sundry lands, heritages, annualrents, and others, in the fee whereof his said father died last vest and seised, at the faith and peace of our sovereign Lord, within the said two sheriffdoms; containing dispensation anent the place and time of vacation, if any such should happen; and dated the       day of       and sealed the       of the same month; with the said macers their acceptation of the said office, on the back of the said commission, dated the       day of       last, signed by the Lord M. one of the said Lords of Session, and A. F. one of the under-clerks of Session, bearing, that the said macers had made faith *de fidei administratione*, and also produced a procuratory, and patent letters, granted by the said J. H. of A. to blank persons, constituting and appointing them jointly



jointly and severally his lawful and irrevocable procurators and attorneys, for procuring him, the said J. H. of A. duly and legally served and retoured nearest and lawful heir foresaid, of his said deceased father, dated      After production of which commission, acceptance, and procuratory, the said A. C. attorney foresaid, desired the said macers to proceed to execute the office of sheriffship thereby committed to them: And accordingly, the said macers elected and chosed      writer to the signet, to be clerk to all the courts, for service of the said J. H. now of A. as heir aforesaid: As also, A. T. and P. S. jointly and severally, to be officers; and J. W. to be dempster for the courts of the said services; and who being all solemnly sworn, made faith *de fideli administratione*. And then the said court was fenced, in name and authority of his Majesty, and by order, and in name and authority of the said macers, as judges by the said commission. And the court being so fenced, the said A. C. attorney foresaid, produced two several briefes issued furth of his Majesty's chancery, directed to the said macers, or any two of them, as sheriffs of the said sheriffdoms of      and purchased at the instance of the said J. H. of A. for cognoscing him nearest and lawful heir-male of the body of his said father, in all and sundry lands, and other heritages, within the said respective sheriffdoms, wherein his said father died last vest and seised, as of fee, at the faith and peace of our sovereign Lord.

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And

And the said two brieves being openly and publicly read, the said judges appointed both the said brieves to be served within the parliament or new session-house of Edinburgh, upon the      day of      next to come: and ordained the said A. T. and P. S. officers, jointly or severally, to pass to the respective market-crosses of      and      head-burghs of the foresaid sheriffdoms of      upon one of the ordinary market-days of the said respective head-burghs, in open time of market, and in presence of famous witnesses, and there and then, respective and successive, to duly and lawfully proclaim the said brieves to be served within the parliament or new session-house of Edinburgh, the said      day of      next to come, in the hour of cause, with continuation of days, and with certification according to law; and to observe the whole order prescribed by act of parliament, (Jas. IV. p. 6. c. 94.) anent proclamation of brieves, in all points. And also, the said judges ordained the said officers to summond a proper inquest, to attend said place and day, and each person under the pain of *L.* 40 Scots. Likeas, the said judges granted and subscribed a precept to the said officers for that effect, of this date; and caused deliver to them the said brieves, to be proclaimed accordingly: And then the said judges adjourned the court to the said      day of      next, then to be held in this place; and continued the service of the said brieves to the said day, in the hour of cause; ordaining all parties

ties having interest, then and there to attend, whereof they were lawfully warned, *apud acta*; and whereupon, and upon all and sundry the premises, the said A. C. attorney fore-said, asked and took instruments in the hands of the said clerk of court.

*This the macers subscribe.*

Here it may be proper to observe, that our older stileists, as Dallas, &c. vary the form of the procedure, in this, that they make the judges to ordain different clerks, &c. for the different courts; the reason of which seems not so obvious. They also extend judicial instruments, under the hands of the notary who was clerk to the second court, of the whole procedure of the first court, and the like as to the second court, under the hand of the clerk of the first court. The use whereof perhaps was, that the party, who was served, might have, in his own hands, some documents of the regular procedure of the service, to be produced in case of an improbation or reduction; and it was necessary that these instruments should be signed as said is, and not the instruments of the first court, by the clerk of the first court, &c. because it would seem a little absurd for one to be notary to an instrument, which bore, that he himself was elected into an office; and, for that reason, it is the general practice to have always two clerks, who extend instruments on each others creation; and as the trouble of getting two clerks is inconsiderable, it seems

more adviseable to use that method, as it has been the antient practice; but it is unnecessary to set down examples of the instruments, and the variation it makes in the acts of courts, as examples of these are abundantly exact in Dallas.

During the sitting of this court, the macers grant a precept to the officers to execute the brieves, which follows.

**WE** two of the four ordinary macers before the Lords of Council and Session, as sheriffs of the sheriffdoms of and specially constituted by virtue of his Majesty's commission, by deliverance of the said Lords of Session, under the testimony of the seal, appointed, in consequence of the union between Scotland and England, to be made use of within Scotland, in place of the great seal thereof, directed to us the said macers, or any two of us jointly, for sitting in the parliament or new session-house of Edinburgh, as judges of the respective jurisdictions foresaid, for serving of two several brieves, issued furth of his Majesty's chancery, to us, or any two of us jointly, as judges foresaid; and purchased at the instance of J. H. of A. eldest lawful son of the deceased J. H. of A. for cognoscing and retouring the said J. H. of A. nearest and lawful heir-male of the body of the said deceased J. H. of A. his father, in special, in all and sundry lands, heritages, annualrents, and others, within the said sheriffdom, wherein his said father died



died last vest and seised, at the faith and peace of our sovereign Lord; and as having, by the said commission, his Majesty's full power, and special warrant, to receive, open, and cause proclaim the said brieves, to begin, affirm, fence, and continue courts, one or more, for serving thereof, to make, create, constitute, and ordain, clerks, serjeants, dempsters, officers, and all other necessary members of court, to summon the inquest to pass thereupon; and to do all other things requisite thereanent: and, as having accepted of the said commission, which is dated the       day of       and sealed the of same month and year, have made, constituted, created, and ordained, and hereby make, &c. you A. T. and P. S. and each of you, jointly and severally, our very lawful and undoubted officers, to the effect after specified, of the said sheriffsdoms of       and       with full power and commission to you, jointly and severally, as said is, to pass, in his Majesty's name and authority, and ours, to the respective market-crosses of the head-burghs of the said sheriffsdoms, successively, upon a lawful market-day, and there, between eleven and twelve of the clock forenoon, in time of open market, and in presence of famous witnesses, to duly and lawfully read and proclaim the said two brieves respectively, or cause the same to be read and proclaimed by another, (the words being also pronounced by one of you our said officers): viz. The one of the said brieves, directed to us as sheriffs of R. at the market-cross of R.

as head-burgh of the sheriffdom thereof; and the other of the said brieves, directed to us as sheriffs of the said sheriffdom of L. at the market-crofs of L. as head-burgh of the said sheriffdom thereof; and both the said brieves to be served within the parliament or new session-house of Edinburgh, the            day of next to come, in the hour of cause, with continuation of days, before us the said macers, or any two of us jointly, as sheriffs, to the effect foresaid, of the said sheriffdoms; and to warn and summon all persons having, or pretending to have, interest in the said matter, by open proclamation at the said market-crosses, to compear before us, or any two of us, as judges foresaid, the said day and place, in the hour of cause, to hear and see the said brieves duly and lawfully served, and retoured to our sovereign Lord's chancery, in due and competent form, or to oppose and object a reasonable cause in the contrary; and to make intimation and certification to them, according to the law in that behalf: As also, we charge and command you, that ye lawfully summon, warn, and charge a sufficient number of persons most worthy, least suspected, and who best know the verity of the said matter, to compear before us the said day and place, in the hour of cause, with continuation of days, to pass upon the inquest of the said brieves, each person under the pain of *L. 40* Scots money, as ye will answer to us thereupon. For doing whereof, we commit to you, jointly and severally,

verally, our full power, to the effect before specified, by this our precept, signed by us in court at Edinburgh, the       day of       years.

Sometimes this further clause is added in the precept by the macers: " And further, for  
 " preventing the expence and trouble of bringing the said officer and witnesses to Edinburgh, to depone on the verity of the execution of the said brieve, we hereby, as sheriffs in that part foresaid, give full power, warrant, and commission to  
 " or any one of them, with full power to him to chuse a clerk, for whom he shall be answerable, to take and receive the oaths and depositions of the said officer, executor of the said brieve, and the witnesses, upon the truth and verity of the executions thereof, after that the said execution is openly read in their presence, and that at       the       day of       and  
 " to cause put all their depositions in authentic writing, to be subscribed by the deponents, if they can write, and the said commissioner and clerk; and to report the same, with this present commission, to us, before the said       day of       next. For doing  
 " of all which, these presents shall be a sufficient warrant: given under our hands, and subscribed by us in court, upon this and the preceding pages, &c."

There may be some difficulty as to the macers having power to grant such commissions; and it is but of late they did grant them: The  
 first

first instance of it was in the case of Sir John Moir's service, where the witnesses who were to prove the propinquity lived in England; and upon application to the Lords, they gave it as their opinion, that the macers might very lawfully grant a commission for taking such proof of the propinquity. Since which time they have been in constant use of granting commissions also for taking the oaths of the executor of the brieves, and witnesses thereto.

Upon this the party authorised to take these oaths, does write a report; whereof the first part, signed by him and the clerk, bears a recital of that part of the commission above copied, and that the commissioner, whose name is filled up in the blank in the commission, has named a clerk; and then the rest of the report contains the oaths of the executor and witnesses, signed by the commissioner, the clerk and them; and a docquet signed by the commissioner and clerk, bearing, that what is written to be the report of the commission. See the particular form of this in the appendix.

If this is done, some variation will occur in the after stiles, which will be easily formed.

This commission is wrote on common paper; for though it might appear that stampd paper was requisite, yet it is not, it being a judicial deed.

*Memorandum for P. S. officer.*

WHEN he comes to R. (which must be,  
[here insert the market-day] next),  
he



he is, between eleven and twelve forenoon, to go to the market-cross, and there, in presence of the two witnesses, (for he must take witnesses with him, who may return to verify the execution with him upon oath), read over the brieve, marked R. and precept from the macers, and then the schedule subjoined to the copy of the brieve; after which, he must fix and leave the copy upon the cross.

He must do the like with regard to the other brieve and schedule, at the cross of L. upon next.

And will remember to cry three several times *eyesses*, at each cross before he begins.

*Schedule of what's to be signed by the officer, executor of the brieves, and witnesses; and to be left at the market-cross.*

A copy of the brieve, and of the director of the chancery's subscription, on the back, is prefixed; and then is added:

**I** P. S. as officer of the sheriffdom of specially constituted, to the effect after-mentioned, by virtue of a precept dated the day of            given to me by the macers of Session, as sheriffs of the same sheriffdom, also specially constituted, for serving of the foresaid brieve issued furth of his Majesty's chancery, at the instance of the said J. H. of A. conform to the commission to them, or any two of them, under the quarter seal, dated and sealed

sealed last, Do hereby proclaim the  
 foresaid brieves, whereof a just copy is hereto  
 prefixed, to be served before the said macers  
 of Session, or any two of them, as sheriffs of  
 the said sheriffdom of within the parlia-  
 ment or new session-house of Edinburgh, up-  
 on the day of next to come, in the  
 hour of cause, with continuation of days; and  
 warn and summon all persons having, or pre-  
 tending interest, to compare, place and time  
 foresaid, to hear and see the said brieves serv-  
 ed, or to object thereagainst; and certify them,  
 if they fail, the said macers, as sheriffs foresaid,  
 will proceed in the service of the said brieves,  
 conform to the tenor thereof, and commission  
 to them for that effect. This I do, at the mar-  
 ket-cross of head-burgh of the said  
 sheriffdom, upon the day of be-  
 fore these witnesses and

*Execution to be indorsed on the back of the  
 brieve, and signed by the officer, executor, and  
 witnesses.*

U Pon the day of years, being a  
 market-day, within the burgh of  
 I, P. S. as officer appointed by the macers of  
 the Session, as sheriffs of the said sheriffdom;  
 and at command, and by virtue of their pre-  
 cept to me in that behalf, dated instant,  
 past to the market-cross of the said head-  
 burgh of and thereat, between the  
 hours of eleven and twelve of the clock fore-  
 noon,

noon, and after crying three several *oyesses*, and public reading of the within written brieve, and of the said precept, I duly and openly proclaimed the within brieve, to be served before the said macers, or any two of them, as sheriffs aforesaid, by virtue of his Majesty's commission to them for that end, and that within the parliament or new session-house of Edinburgh, the        day of        next to come, in the hour of cause, with continuation of days; and duly and lawfully warrant all persons having, or pretending to have, interest, to compare, time and place aforesaid, with continuation, as said is, to hear and see the within brieve served, or to object thereagainst; and I made certification to them as effects; and I affixt and left upon the said market-cross, a schedule, containing a copy of the within brieve, the date and whole tenor of this my execution, and the names and designations of the witnesses who were present thereat, and are hereunto with me subscribing, *viz.* G. S. and A. D. both indwellers in

When the time of executing the brieves runs too near Whitsunday or Martinmas, they may be execute on any day, upon calling together six people of the town. See Stair p. 468. Tho' this seems only to hold when the predecessor dies near the term; and not if the heir should neglect taking out his brieves in due time. Concerning the execution of brieves, see act 94. parl. 6. Jas. IV. and act 60. parl. 11. Jas. VI.

After

After the day to which the court was adjourned is come, the court again meets; and if the officers be not returned with their executions and witnesses, or any accident happen, which renders it either impossible or inconvenient to have the briefes served that day, the court must again be adjourned; but this is so very easy in form, that 'tis needless to set it down; only observe, that a title is to be prefixed to the acts of court that day, the same as in the following acts; and after mentioning the court to be met, and the day and place, as is therein done, let either the procurator, judge, or any other member of court, set furth why the court cannot so conveniently proceed; and then let the judges continue and adjourn the court to any proper day, wherein all parties, jurors, witnesses, officers, dempsters, and members of court are ordained to be present; on which the procurator is to take instruments, and the continuation is to be signed by the judges: But if there be no occasion for an adjournment, a jury is to be chosen and sworn, and the briefes verified, and all parties openly cited, and the claim presented to the jurors or assisers, and the same verified, and the jury are to give their verdict thereon; all which is set furth in the acts of the second court.

The oath commonly put now to the inquest is only, "*You will be faithful in this inquest;*" and the jury hold up their hands, by fives at a time, and make only a bow, in token of their assent.



assent. Altho' the oath formerly administered has been as follows; "*You shall say truth, and no truth conceal, according to your knowledge; so help you God; and neither have taken, nor shall take bribe from any party.*"

*Oath to the officer, executor of the brieve.*

**BY** God, &c. You did proclaim and execute the brieve, in such manner as is mentioned in the indorsation thereof, signed by you; and this is truth, as ye shall answer to God.

*Oath to the witnesses who were present at executing.*

**BY** God, &c. You heard, and saw, and stood by, when the said officer proclaimed and executed the brieve, in such manner as is mentioned in the indorsation thereof, signed by you; and this is truth, *ut supra.*

*Oaths of witnesses, for proof of the claim.*

**A** And B being solemnly sworn, examined, and interrogated, depone affirmative to the propinquity of the claimant, and the time of his father's death.

*This last to be signed by the witnesses, and wrote upon the margin of the claim.*

*Citation by the officer in court, and at the door of the court-house.*

OYels, oyels, oyels; If there be any person or persons who have any thing to object against the service of the brieves purchased furth of our sovereign Lord's chancery, by        of        for cognoscing him nearest and lawful heir-male of the body of the deceased J. H. of A. his father, in all lands and heritages wherein his said father died intest, let them come furth and they shall be heard. Once, twice, thrice.

*Nota,* This citation is called two several times in presence of the maecers, (judges) and the inquest; after which it is called a third time at the outer door of the parliament-house; and it is usual, if there be no objection made to the service, to take instruments in the hands of the clerk to the service, on that fact.

*Claim of J. H. as heir in special of the deceased J. H. of A. his father.*

HONourable persons, and good men of inquest, unto your wisdoms says, J. H. of A. eldest lawful son of the deceased J. H. of A. That the said deceased J. H. of A. my father, died last vest and seised at the faith and peace of our sovereign Lord George the Third, now reigning, in the fee of all and whole the lands  
and

and barony of A. comprehending the lands and others after-mentioned; viz. [*Here take in the lands.*] All which lands, milns, and others before specified, were erected and incorporated into one whole and free barony, called the barony of A. as said is, conform to a charter of resignation, and *novodamus*, of the said lands and others, dated            and sealed            and granted by her late Majesty Queen Anne of blessed memory, as Queen, Prince, and Stewart of Scotland, under her great seal, in favours of the now deceased J. H. of A. my grand-father, in liferent, and the said deceased J. H. of A. my father, therein designed eldest son of the said J. H. elder, in fee, and the heirs-male, lawfully to be procreate of the body of the said J. H. younger; whom failing [*Here take in the substitution; and in case the lands be tailzied, after taking in the substitution, you'll insert the conditions, &c.*] specially after-mentioned, contained in a bond of tailzie, granted by            &c. (as the case is), and registered in the register of tailzies the  
 viz. with this provision, &c. as in the said tailzie and charter foresaid following thereon, more fully is contained, dated            registrate            heritably and irredeemably; and, by which charter, a seisin to be taken at the manor-place of A. is declared and ordained to be a valid and sufficient seisin, for the whole lands, mills, and others before specified, united and erected into the said barony, as said is, and notwithstanding of their lying discontinuous,

and within different jurisdictions; and which charter contains also a grant and dispensation for procuring the heirs foresaid of the said deceased J. H. elder and younger, served, retoured, and inest in the said lands and barony, comprehended and lying as said is, as well in their minorities, as after their majorities, notwithstanding the said lands are holden taxward. [Nota, *If the dispensation to serve during minority be by a writ only under the signet, it will vary a little this part of the claim.*] They always paying the taxward relief, and marriage-duties after specified, in manner more fully mentioned in the said charter, and instrument of seisin thereon; and that I am eldest lawful son, and nearest lawful heir-male of the body of the said deceased J. H. younger, my father, in the said lands and barony of A. comprehending and lying as aforesaid; and that I am, and was of lawful age, at the time of my said father's death, but unmarried [*or married*] at the time thereof: Or, and that I am of lawful age, in virtue of the dispensation before-written; and that the said lands and barony of A. comprehending, and lying as aforesaid, are now worth yearly the tack-duties after specified, and were worth, in the time of peace, the sums particularly after-mentioned, viz. [*Here take in the old extent of every parcel of lands particularly.*] And that the said lands of \_\_\_\_\_ are holden of his Majesty, and his royal successors, by military service; but whereof the non-entry, relief, and marriage, are taxed to the payment of



of the sums of money after-mentioned, viz.

Scots, yearly, at two terms in the year, Whitsunday and Martinmas, by equal portions, during the whole time of the ward and non-entry, or either of them; the like sum of for the relief thereof; and the sum of

Scots for the marriage of each heir succeeding in the said lands, as oft as the said casualty shall happen. And that the said lands of with the miln thereof, &c. are holden of his Royal Highness

Prince of Great Britain, as Prince and Stewart of Scotland, by military service; but whereof the non-entry, &c. [*Take in as in the lands holden of the King. Nota, If there be any other lands, as blench, &c. the manner of narrating them here in the claim is so obvious, that 'tis needless to set it down.*] For all other burden or secular service which can be demanded furth and from the said lands. [*Nota, In case some parts of the barony have been sold off, and public infestment has passed thereon, the duties proportionable to them are deduced from the baronies; and the reason of this should be always mentioned, which is done by adding after what is already said.*] And all which sums before-mentioned, due for the lands holden, whether of his Majesty, or his Royal Highness as afore-said, are the shares correspondent to the said lands, of the ward-duty and non-entry of

and marriage-duty of

and relief of to which sums the ward, non-entry, relief, and marriage of the whole

foresaid lands, and of the other five and one-half merk land of [Or in case the proportion of that sold land be instructed by the true rent, or valued rent, mention it accordingly. Vide also Dallas, p. 887.] formerly part of the said barony, are taxed by the said charter thereof before-mentioned; after deduction therefrom of the ward-duty of and marriage-duty of as the proportions of which the said five and one-half merk land are to bear, by the charter of the same under the great seal, in favour of proceeding on the resignation of my said father and grandfather, dated and and that the said lands and barony are now in the hands of the said respective immediate lawful superiors of the same, by reason of non-entry, through the decease of the said J. H. of A. my father, who deceased in the month of and so have remained in the hands of the said superiors thereof, for the space of months, or thereby, by reason of my not presenting my just right thereto, as nearest and lawful heir-male of my said father. Herefore I beseech you to cognosce and serve me nearest and lawful heir-male of the said deceased J. H. of A. my father, (as being eldest son of his body), in all and whole the said lands and barony of A. comprehending, and lying as aforesaid; and return the said service to his Majesty's chancery, under the most part of your seals, as use is. According to justice, and your wisdoms answer.

*This*

*This the procurator signs, or the claimant if present.*

*Nota,* Where the lands, in which the heir is to be served, are partly tailzied, and partly untailzied, 'tis usual to compound the claims as to both into one, so as that one retour may serve for both; and then, at this place, after this dispensation is set forth, the claimant says again, "And that the defunct died also vested and seised, at the faith, &c. in the fee of "such and such lands, extending to "merk lands;" and then also in every other point, after affirming it with relation to the untailzied lands, 'tis also affirmed as to the tailzied lands, till you come to the head, in whose hands the lands now are, &c. where both are usually joined together, by saying in general, that the whole lands, &c. have been in the hands of the superior, by reason of ward and non-entry, respective, &c. *ut supra.*

### The INQUEST.

SET down their names in three separate columns, five in each column.

### Their VERDICT.

AT Edinburgh the            day of  
The whole persons of inquest before-named, being all solemnly sworn, and admitted to pass upon the service of the brieves  
issued

issued furth of his Majesty's chancery, for enquiring into the foresaid claim; and having all heard, seen, and considered the claim before-written, with the writs produced, and testimonies adduced in court, for instructing thereof, and no person objecting, albeit legally cited, thrice called, and lawful time of day waited, they all in one voice, and without variance, Find the claim before-written sufficiently instructed and proven, and serve the said J. H. claimant heir foresaid, conform to his said claim; and ordain the service to be retoured with the brieves to his Majesty's chancery. In testimony whereof, these presents, and the claim, are, in their presence, and by their direction and consent, signed by the said Sir whom they had elected their chancellor.

*This is signed by the chancellor, and commonly subjoined to the foot of the claim.*

*Second court of the service of the two several brieves issued furth of his Majesty's chancery, and purchased by the said J. H. of A. for serving him nearest and lawful heir-male of the body of the said deceased J. H. of A. his father, continued to, and holden this day of      within the parliament or new session-house of Edinburgh, by the before-named four ordinary macers before the Lords of Council and Session, as sheriffs of the said two several sheriffdoms of L. and R. specially constituted for that end, in virtue of his Majesty's*



*jesty's commission before specified, to them on that behalf directed.*

*Curia legitime affirmata.*

**I**N presence of the said macers before-named, as sheriffs foresaid, sitting in judgment, compeared the severally worthy persons after-named, who had been lawfully summoned before to pass upon the inquest of the foresaid brieves, as being least suspected, and who best know the verity; they are to say, [*Here take in their names as before directed.*] As also compeared personally the said A. C. as attorney specially constituted to the effect before and after-mentioned, by the said J. H. of A. conform to the procuratory and patent letters formerly mentioned, granted to him and others, jointly and severally, of the date before specified; and there in court the said attorney reproduced the two brieves before-mentioned, directed to the said macers, or any two of them, as sheriffs of the said sherriffdoms of L. and R. for cognoscing the said J. H. of A. nearest and lawful heir-male of the body of the said deceased J. H. of A. his father as aforesaid; together with the said macers their precept, ordaining the officers of court before-named to proclaim and execute the said brieves, and together also with the two separate executions of the said two brieves on the back thereof respectively, under the hand of the said P. S. one of the officers of court, and of the said G. S. and A. D. as witnesses thereto, bearing

ing the said P. S. officer, to have passed to the market-crofs of            head-burgh of the sheriffdoms thereof, upon the            day of            last; and to the market crofs of L. head-burgh of the sheriffdoms thereof, upon the            day of the same month of            last, being the respective market-days of the said two burghs, and there, at each of the said market-crosses, and at the time of public market, to have duly and lawfully proclaimed and execute the said two brieves, in manner directed by the said judges their precept; and which two brieves, with the executions thereof, and precept foresaid, being delivered by the said attorney to the clerk of court, the said judges caused the said two brieves, with the respective executions thereof, to be audibly and publicly read: After reading thereof, the said P. S. officer, who did execute the said brieves, and the said G. S. and A. D. witnesses, who were present at the execution thereof as aforesaid, did give their oath anent the truth of the said respective executions; and who being solemnly and judicially sworn, deponed, That the said two brieves, and each of them, were truly and faithfully proclaimed and execute, conform to the respective executions thereof, in all points, as they should answer to God: Whereupon the said judges found, that the said brieves were duly and lawfully execute and proclaimed. Thereafter, the said attorney exhibited and produced a claim for the said J. H. of A. beseeching that he might be cognosced  
nearest

nearest and lawful heir-male of the body of the deceased J. H. of A. his father, (in special), in all and singular the lands, and other heritages therein specified, and in fee whereof his said father died last vest and seised, at the faith and peace of our sovereign Lord; and that the service of the said briefes might be returned to his Majesty's chancery, in full and proper form. And for verifying the said claim, the said attorney produced, in presence foresaid, the writs after-mentioned, *viz.* Charter under the great seal, &c. of the lands and barony of A. comprehending, lying, and to be holden, as in the said claim is set forth; in favours of            in liferent, and the said J. H. of A. his eldest son, and father to the claimant, in fee, and the heirs-male of his body, &c. dated            sealed            with the instrument of feisin following thereon, in favours of the said            in liferent, and the said J. H. younger in fee, dated            and recorded at

As also, for proving the old extent, a charter or retour, &c. [*Here they are taken in.*] As also, for proving the deduction of a part of the barony made in the said claim, a charter, &c. in favours of            upon the resignation of            dated            and sealed

And after production of all which claim and writs, the said macers, as judges foresaid, caused the said A. T. officer of court, call peremptorily and openly in judgment, all parties having, or pretending to have, interest; and none compearing to object against the said briefes,

briefes, and lawful time of day being waited,  
 the said attorney protested *contra omnes non  
 comparentes*, that they might be silent forever  
 hereafter; and also desired, that the said claim,  
 writs produced, and testimonies to be adduced  
 for verifying the said claim, might be referred  
 and admitted to the knowledge of the inquest  
 before-named: and the said macers, as judges  
 foresaid, finding his desire to be just and rea-  
 sonable, they admitted thereof, and remitted  
 the said matter to the knowledge of the fore-  
 said inquest; and who being all solemnly sworn  
 by the said judges, made faith *de fidei admi-  
 stratione*; and they unanimously elected the  
 said Sir M. S. to be their chancellor; and there-  
 upon the said claim was openly and publicly  
 read, and compared with the foresaid writings  
 and infestments produced for vouching and ve-  
 rifying thereof. [*Instead of this, the propin-  
 quity, when proven by witnesses, must be here  
 mentioned to have been so done.*] And the ma-  
 jority of the persons of inquest publicly owned  
 and declared their knowledge of the claimant's  
 propinquity of blood to his said father, as set  
 furth in the said claim. And thereafter, the  
 said macers, as judges foresaid, caused the said  
 A. T. officer call again thrice peremptorily at  
 the most patent door of the said new session-  
 house, all parties having, or pretending to  
 have, interest, and none compearing to object,  
 the said A. C. attorney foresaid, again protest-  
 ed *contra omnes non comparentes*, and that they  
 might for ever hereafter be silent. And then  
 they,



they, the said worthy persons of the inquest, all with one voice, and without variance, by the mouth of their said chancellor, Found the foresaid claim sufficiently verified and instructed; and therefore served and cognosced the said J. H. of A. nearest and lawful heir-male to his said father, in special, in the several lands, and other heritages, wherein his said father died last vest and seised; and that conform to the said claim, and the verdict of the said inquest subjoined thereto, and signed by the said chancellor in all points: and ordained the said service, with the said two brieves, and under the clerk of court his hand, to be returned to his Majesty's chancery. And to which verdict and service, the said macers, as judges foresaid, adhibited, and hereby adhibit, their authority, and ordain the same to be retoured, in manner foresaid: Whereupon, and upon all and singular the premises, the said A. C. attorney foresaid, asked acts of court, and instruments in (under the hands) the hand, and subscription manual of Mr H. C. clerk of our court, as aforesaid.

*This the macers subscribe.*

The acts of court, with the claim and verdict thereon, signed as aforesaid, (and the oaths of the witnesses, if any be), are kept by the clerk for his warrant; and thereupon he extends the service, which is wrote in Latin, upon stampt parchment, if holden of a subject-superior, but on unstampt parchment, if holden

K

of

of the Crown; (See the act of Queen Annanent stamp duties, *anno* 1712), and is nothing else than what is contained in the claim; only the claimant there speaks in the first person, here the clerk puts the verdict in the third person. The form of it will sufficiently appear from what follows.

**H**ÆC inquisitio facta fuit in prætorio seu nova sessionis domo Edinburgi, die mensis anno Domini coram quatuor clavigeris ordinariis coram Dominis Concilii et Sessionis, vicecomitibus in hac parte vicecomitat. de et specialiter constitut. virtute commissionis sub testimonio sigilli, per tractatum unionis custodiend. in Scotia, vice et loco magni sigilli ejusd. utend. ordinat. ex deliberatione Dominorum Concilii et Sessionis, datæ et directæ de data ultimo elaps. dispensationem tam penes locum quam tempus vacantiae, si contigerit, in se continentem; per hos probos et fideles homines patriæ. [*Take in their names.*] Qui jurati dicunt magno sacramento interveniente, quod quond. J. H. de A. pater J. H. nunc de A. obiit ad fidem et pacem S. D. N. regis, ac ultimo vestit et sasit in feodo totarum et integrarum terrarum et baroniæ, comprehendent. inibi terras aliaque postea mentionat, viz. [*And so goes on as in the claim, till the word Herefore; instead of which he adds,*] In cujus rei testimonium sigilli majoris partis, (or quondum,) eorum qui dict. inquisitione intererant

tererant una cum brevibus regis, intus clausis  
ac sigilli dict. clavigerorum tanquam vicecomi-  
tuum ante dict. sunt appensa, una cum sub-  
scriptione manuali Mri. H. C. signeto regio-  
nostro clerici et notarii publici, ac deservitio-  
nis dict. brevium curiæ clerico, apud Edinbur-  
gum dict. dict. mensis  
anno

Præmissa supra hac et præcedent.  
paginis, scripta vera esse attestor ego dict.  
Mri. H. C. Sic subscribitur H. C. N. P. et  
C. S.

Although the service bears the seal of the  
macers and jurymen to be appended, yet this  
has gone into desuetude.

It may be proper here to notice, that when  
heirs portioners succeed, there is some small  
variation in the claim, and other parts of the  
service; and when the whole heirs portioners  
concur and expedite one service for all, the vari-  
ation is very inconsiderable, and the special  
claim will run.

**H**ONOURABLE persons, &c. We, A. B. and C.  
lawful daughters to the deceased J. H.  
of A. do say, That the said deceased J. H. of  
A. our father, died last vest and seised, as of  
fee, at the faith and peace, &c. in all and whole  
the lands, &c. And that we, the saids A. B.  
and C. are the three lawful daughters, and  
nearest lawful heirs portioners of the body of

the said deceased J. H. our father, in the lands and barony, &c.

But when the heirs portioners don't concur in one service, the claim will run :

**H**onourable persons, &c. Unto your wisdoms says A. second lawful daughter, and one of the three heirs portioners to the deceased J. H. of A. That the said deceased J. H. of A. my father, died last vest and seised, as of fee, at the faith and peace, &c. in all and whole, &c. And that I am second lawful daughter, and nearest lawful heir portioner to the said deceased J. H. my father, in a just and equal third part of all and whole the lands and barony of A. lying and comprehending as aforesaid, as one of the three lawful daughters, and heirs portioners, procreate of the body of the said J. H. and that I am of lawful age, &c.

From what has been said hereon, it will be easy to make the variations necessary throughout the whole parts of the service.

It may also be proper to notice, that it very often happens, through the want of a former retour of lands, the old and new extents cannot be instructed to the inquest. To obviate which inconveniency, the barons of exchequer, by an order dated 7th February 1731, "Ordered, That when lands are to be retoured, the value whereof is unknown, the rule of settling the same shall be as follows, viz. The old and  
" new



“ new extent of the lands sought to be retoured,  
 “ ed, shall be in proportion to the valuation, and  
 “ the old and new extent of other lands, lying  
 “ within, or adjacent to the county wherein the  
 “ lands to be retoured as aforesaid do lie.”

So that the variation by the old and new extent of any lands in the neighbourhood being known, the present rent of these lands, either real or valued, for paying the public burdens, being compared with the like rent of the lands whose old and new extent is wanted, will show what their old extent is; which will be a sufficient warrant to the inquest to find accordingly.

Before we proceed to show how the heir gets infestment upon this retour, it is to be observed, that, by the act 24. f. 5. p. 1. King William and Queen Mary, heirs are allowed to enter to their predecessor's estate, *cum beneficio inventarii*, in the manner mentioned in the said act. And as it may be thought, that an heir, who is retoured within the *annus deliberandi* simply, and without mention of the benefit of the inventory, would thereby subject himself absolutely to his predecessor's debts, although he give up inventory within the year, because the act evidently supposes the inventory must be given up before he succeeds; so it would be very foolish to run that risk: And although, when the inventory is given up, there might be less hazard in the heir's entering simply to the lands, without mentioning the benefit of the inventory, yet still it is more accurate to do it; and therefore, in both these

cases, 'tis proper to mention in the procuratory, and bill to the Lords, that the heir is only to be served, *cum beneficio inventarii*, conform to the act 24, s. 5. of the 1st parliament of King William and Queen Mary; and that this be mentioned in the claim, on the second head of the brieve, and in the acts of court; and if the inventory be already made and given up, particular notice therefore may be taken in the second acts of court.

As this inventory is thus connected with the method of an heir's making up his titles, we shall give the form thereof, in a case where it is given up by tutors and curators, which may be easily reduced to every other case; and it may be premised, that these inventories must be as many as there are different shires in which the estate of the defunct lies, because the principal is to be left with the sheriff-clerk of that shire.

FORM of the INVENTARIES given up by heirs, in terms of the act 1695.

*Inventory of the heritable estate, within the shire of                    which belonged to the deceased J. E. or whereof he died in the possession, and wherein M. E. only child of the said deceased J. E. intends to succeed, as heir general and of line, cum beneficio inventarii, of the said J. E. his father, who died the day of                    faithfully made up, and given in upon oath, in terms of the 24th act,*

*act, &c. entitled, &c. dated, &c. But with and under the protestations and conditions after-written. B. S. G. E. of M. Baronet, Mr J. F. of P. advocate, &c. [Here were taken in the other tutors names.] The accepting tutors nominate to the said M. E. by his said deceased father's nomination, whereby any two of them are declared to be a quorum, &c. which is dated, viz.*

**T**HE said deceased J. E. had belonging to him the lands of, &c. [*Here the lands and annualrents, in which the defunct died in-  
fest, are related somewhat generally, with refer-  
ence to his charters and seifins, and their dates and registrations; and then is added,*] But which inventory before-written, is given up by the said tutors, under the exprels conditions and protestations after-written; viz. 1mo, That the said M. E. shall, in accounting, have allowance of all such charges and expences as he shall disburse and lay out in making up his titles to the foresaid subject. 2do, That it shall be lawful to him, and his said tutors and curators for the time, to add to this present inventory, any other heritable estate to which he may succeed, (if any be omitted herein) which may hereafter come to his knowledge, in the terms of the act of parliament above-mentioned: And, in the last place, That as the said tutors are, by the said nomination granted by the said deceased J. E. declared to be only liable for their actual intromissions, and

not

not *in solidum*; so the said tutors their giving up this present inventory, shall no ways subject, or make them liable for any omissions with regard to the heritable estate herein before-mentioned, or for one another, or *in solidum*, but only account for their actual intro-missions therewith; if any such they shall have, and each of them for their own proper intro-missions only, and no further. In witness whereof, these presents wrote by  
are subscribed by the said S. G. E. and Mr J. F. at before these witnesses

*Copy of the oath given to the tutors.*

**I**N presence of one of his Majesty's justices of peace, for the county of \_\_\_\_\_  
compeared the within designed S. G. E. and one of the accepting tutors of the within-mentioned M. E. conform to the nomination within-specified, and produced the inventory within-written, containing the protestation and conditions within-specified, duly signed by him the said tutor; who being solemnly sworn and interrogated, upon his great oath, by the said justice of peace, depones, That, to the best of his the deponent's knowledge, at the time, that the within inventory, consisting of \_\_\_\_\_ all signed by him, is a just, true, and full inventory of the lands and heritable estate which belonged to the deceased J. E. within the shire of \_\_\_\_\_ and wherein the said M. E. intends to succeed, as  
heir



heir of the said deceased J. E. *cum beneficio inventarii*, in the terms of the act of parliament thereanent, in the year 1695. And that this is the truth, as the deponent shall answer to God. (Signed) G. E. and by the justice of peace.

The like oath was made by the other tutor, and signed by him; for two oaths cannot be put regularly together into one.

This inventory is registred in the register of the sheriffdom where the subjects lie, within the *annus deliberandi*, and an extract thereof taken out, for which the like dues are paid as for other extracts of the same length; and this extract must be again registred in the books of session, within forty days of the *annus deliberandi*.

After the service is retoured; as in order to vest the subjects absolutely in the person of the heir, 'tis requisite that infestment be given him: so now we come to show the method how this infestment is to be obtained. If the lands hold of the king, the director of the chancery gives out a precept under the quarter seal, for the sheriff of the shire to infest the heir served, on payment, or finding caution to him for the sums contained in the precept, which appear by the retour. This the sheriff almost never refuses, because he himself has a good perquisite for the giving, *viz.* the *feisin-ox*. But if he should, or if there be no sheriff at the time, the party may supplicate the  
 Lords

Lords to ordain the director to give a precept to any person the heir is sure will give the infeftment, as sheriff in that part; as is also done in the case where the sheriff is the party who is served heir, and who cannot possibly give infeftment to himself; but still it would seem the sheriff-clerk must be notar to the seisin.

If the lands hold of the prince, and there be no prince, the king, *qua* prince, grants the precept, directed to the steward, and he gives infeftment, and his clerk is notar, as in the case where lands lie within a sheriffdom; for all the prince's lands lie within stewartries, and this will pass, as the other, under the quarter seal. But if there be a prince, the party must apply to the barons of exchequer, or the keeper of the prince's seal in Scotland, who will give a precept to the steward under the prince's seal, as the other does under the quarter seal.

It is to be observed, that when a creditor dies who is infeft, holding of the king or prince, in lands, in security of a sum, or in warrandice, &c. he will be obliged to have the retoured duties of the lands contained in his retour; and the precept will be issued to the sheriff to infeft, on paying, or finding caution for the retoured duties. But as another person is truly proprietor of the lands, and the property of the lands has either been full by him, or else the non entry, &c. fall by him, so upon setting furth this to the barons, they will either grant a warrant to the sheriff to infeft the heir, without paying them; or if he

has granted bond for them at infestment, or-  
dain such bond to be delivered back again.  
There is also a particular order to the barons,  
anent the retoured duties of vassals within lord-  
ships of erection.

In both the above cases of precepts for in-  
festing heirs, in either the king or prince's  
lands, the retoured duties are calculated to the  
term preceding the precept; and therefore in-  
festment must be taken before the next term,  
else the precept will be void by the clause *pra-*  
*sentibus post prox. term. minime valetur*, insert  
therein, and a new one must be taken includ-  
ing that term's retoured duties, and so on, un-  
til infestment be taken.

These are the methods if the lands hold of  
the king or prince; and we come now to the  
case, when the lands hold of a subject.

When a subject-superior is infest himself,  
and willing to grant infestment to his vassal,  
then he grants a precept of *clare constat*, nar-  
rating the service and retour, if it be retoured,  
and thereupon the heir is infest: and very of-  
ten to save charges, the heir does not retour  
his service to the chancery, but only shows his  
superior the extract of his service, under the  
clerk's hand, as the same can be retoured to  
chancery even after the heir's death, the re-  
tour bearing no date but that of the service;  
as was found in the late competition about the  
estate of Bargony: Though more commonly  
the superior grants precept of *clare constat*, up-  
on his own knowledge of the heir's propinqui-  
ty,

ry, without putting him to the trouble of expending a service at all, as has been observed before.

If the superior be infest himself, and refuse to grant a precept of *clare constat*, the heir gets three precepts from the chancery successively against him, on taking a protest at offering him each precept; which precepts are wrote by the keepers of the chancery, and are of a fixed stile; the form of which may be seen in Spottiswood's appendix to Hope's minor practises; and the form of the instrument of protest, in the late art of notary, page 202.

*Nota*, A horning against the superior, will pass of course, by 20mo Georgii 2di.

The superior commonly suspends the precepts, on pretence of the non-entry, &c. not being paid; after discussing of which, he is commonly decerned to infest the vassal; and it appears the Lords would grant costs, if the superior had no sufficient reason of suspension: and, for the most part, the superior must consign a precept of *clare*, before obtaining this suspension, which is delivered to the vassal upon discussing the suspension.

After discussing this suspension, it seems doubtful, where no precept has been consigned before suspending, whether diligence by caption, &c. would follow against the suspender, to compel him to grant infestment, or only three precepts, in the like order, would be run against the next superior, and protest taken thereon, in the same manner as was done against



against the immediate superior not suspended; and this order, of three successive precepts, is followed out against every superior, till you come to the king: and then you give in a bill to the Lords, representing what order has been followed; and showing the several precepts and protests, the Lords will grant warrant to the director of the chancery, to issue a precept to the sheriff for infesting the heir; and if the sheriff should also refuse, upon a second bill to the Lords, they would grant a warrant for issuing a precept to any person, as sheriff in that part: See Park's stile-book, p. 264, and Law Dictionary, at the word *infestment*. And this method of running three precepts against every superior, till you come to the king, seems most consonant to the order of chancery; though Park, in the same stile-book, p. 300, and Stair, p. 571, say, That if the immediate superior refuse the whole three precepts, thereupon producing to the Lords the last precept, with the instrument taken upon the refusal, they will grant horning against the next superior, charging him to infest the heir under the pain of rebellion; and so from superior to superior, till it come to the king: And it is likely the Lords would not put an heir to expence, but would grant that more summary remedy, by a direct charge; and, with this method, Balfour in his Practicks, *ad fin. tit. Order of the Chancery*, agrees. It is informed, after the three precepts have been run against the first superior, the chancery are in use directly

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to grant a precept to the sheriff, without noticing any intermediate superiors betwixt the first superior and the Crown, which is certainly wrong. This case of having two superiors betwixt and the king, both unwilling to grant infeftment, so seldom occurs, that it is not mentioned by Skene, at the word *Brieve, de morte antecessoris*. Hope's Min. Pract. §. 133. Stair, p. 474. Dallas, p. 884. though there treating of the form of running precepts against superiors refusing to grant infeftment.

But if the superior is not infeft himself, then any precept of *clare constat* granted by him would be ineffectual; and therefore, in order to compel him to infeft himself, the heir may, in terms of the 58th act, James III. charge his superior to enter heir in special, within forty days, in the superiority, to the end he may be in a capacity to infeft him, with certification if he fails to enter, he shall lose his superiority during his life; *i. e.* during the superior's life. *Vide* M'Kenzie's observations on the act.

This certification is reduced to be of very little effect, by the Lords restricting it only to the non-entry, and not making the superior lose his whole casualties of superiority during his lifetime, as they are sufficiently warranted to have done by the act; see Stair, p. 475. Only it is to be observed, that the act provides, that the superior refusing to enter shall be obliged to pay the vassal's damages, which is not noticed by Stair.

The form of the special charge you will find  
in

in Dallas, p. 459. and 460. and in both these, and p. 885. he requires the three precepts to be run against the superior, as well as the special charge : But there can be no occasion for the precepts, where the superior lies out unentered. Indeed if he should be so willful as to enter himself upon the special charge being executory, and yet refuse investiture to his vassal, in that case, no doubt, it would be necessary to run the precepts against him.

After the forty days of the special charge are elapsed, the vassal may raise a declarator of tinsel of superiority against his superior, and conclude also against the immediate superior, who may be called in the same summons; and if the mediate superior be not infest, the like special charge must be used against him; and commonly the officers of state for the Crown are also called, that, failing the other superiors, the director of the chancery may be discerned to issue a precept for infesting the vassal. This declarator may be easily formed from that in Dallas, p. 234.

This declarator of tinsel may proceed in the case of the superior being infest, and the three precepts run against him, as well as in the case where the superior is not infest, and special charge used against him, and against the mediate superior, as well as the immediate, according to the opinion of our lawyers, at the places above-cited. The reason is indeed the same in both cases; but there seems no warrant, from the act of parliament, for a tinsel of superiority,

ty, in the case where the precepts are run, nor indeed from the stile of the precepts; and the declarator of tinsel is of so little consequence to the vassal, unless where it is a necessary step for calling the next superior, that it would be foolish for the vassal to sue such a declarator; as one of our greatest lawyers is of opinion, That, where the superior is infest, no declarator of tinsel can proceed against him, and that he loses nothing else but the relief, by his refusing to enter his vassal.

Here some nice enough questions occur; *1mo*, Whether or not a vassal thus infest by the king, upon refusal of the superior, would be considered as a freeholder, or king's immediate vassal, during his lifetime? It is thought he would not; for the king only infests him *supplendo vices* of the immediate superior. *2do*, If the king could pursue a non-entry of the lands, as the king's immediate vassal, as lying out unentered? It is thought the hardship would be so great that he could not pursue a non-entry; yet it seems difficult to reconcile this with the former question: Did the vassal hold feu for a competent avail, a good deal might be said from the acts 71. James II. parl. 18. James VI. act 16. Parl. 1. Charles I. *anent Subinfeudation*, that the king could only claim for his non-entry the feu-duties payable by the vassal. But the difficulty is very great where the vassal holds blench. *3tio*, If the vassal being already infest, his superior should die, whose heir lies out unentered, and the king pur-



pursues a non-entry, whereby he would carry away the rents of the vassal's lands, what way shall the vassal take to exclude the non-entry? Park in his stile-book, page 306, says, the vassal may, just as if he were not infect himself, raise special charge against his superior, and tinsel of superiority, and thereby take a new infectment from the king: but the difficulty mentioned in the second question occurs, viz. How far, by so doing, the fee is rendered full? for the vassal would still pay his feu-duties, &c. to his former superior, and so could not, in any proper sense, be said to become vassal to the king. Another method might be, If the superior represented the person who first feued out the lands to the vassal and his predecessors, to raise an action, on the passive titles, against the superior's heir, to warrant the vassal's right, and not to suffer any part thereof to be evicted through the superior's fault, in not entering himself; and commonly, to obviate any difficulty as to the competency of such an action, there is a special clause for that purpose inserted in most dispositions, or feu charters, obliging the superior not to lie out un-entered. But where the present superior is a singular successor to the original superior, there seems more doubt how far such an action could be brought, from the nature of the feu contract between the superior and his vassal; and supposing a decret to be obtained against the superior's heir for a certain sum, in name of damages, thereupon an adjudication may be led,

and a charter obtained from the king, which no doubt would stop the non-entries. Another method, and less subject to dispute, is for the vassal to acquire right to some of the deceased superior's debts, and thereupon adjudge and take a charter of adjudication. But as these questions seldom or never occur in practice, and as the intention of this collection is only for practice, we shall wave the further consideration of these points, the bare hinting of them being sufficient to put one upon their guard to consider them duly, should they ever occur.

Another case remains to be mentioned, and that is, where a superior succeeds as heir to his vassal; the difficulty is, to whom shall the precept be directed for granting infeftment, as it seems preposterous to direct the precept to the superior for granting precept of *clare constat*, for infefting himself, and so sustaining two capacities: The Lords at first ordained precepts to be directed furth of the chancery for infefting in such a case; but now it is settled in practice, that without any service at all, the superior grants himself a precept of *clare constat*, as heir to his former vassal, and thereupon infefts himself. It is commonly thought that the rights of superiority and property being both established in the same person, the right of property would be consolidated with the superiority; but as some make a doubt of it, it is very proper to put a clause in the precept of *clare constat*, declaring that the property should become consolidate with the  
 supe-

superiority; and where that has been omitted in the precept, to cause execute a procuratory and instrument of resignation *ad remanentiam*, and registrate the instrument of resignation within sixty days, so as to leave no doubt; for the consequence is very dangerous if the consolidation should be found not to take place, as every after infestment would only carry the superiority, and the right of property would remain in *hereditate jacente* of the first person, so that any deeds granted by the after-heirs might not affect the same, otherways than as being three years in possession, according to the act 1695.

Some think that where a superior succeeds to his vassal, he needs nothing further to complete his title than to expedite his service, and to mention therein that the property should be consolidated with the superiority, without necessity of infesting; but that is certainly contrary to principles, for nothing can extinguish an infestment of property, but an infestment in favours of some other person, or a resignation *ad remanentiam*, in the case of a voluntary deed by a vassal to his superior.

And altho' a registred renunciation extinguished a wadset, or other redeemable right, that is only in virtue of the act 1617, which statuted that expressly, for saving expences in extinguishing redeemable rights.

Having thus gone through special services, and the manner of an heir's making up titles  
to

to lands, and in which their predecessors died infeft, it remains only to add somewhat in general services.

These are never expedite before the macers, except when the same person is serving himself heir in special to the same predecessor before them; and then, for the most part, a general service is also expedite for the conveniency of giving out in process, and mention must be made thereof in the bill to the Lords; and so warrant will be given to the macers, in their commission, to serve the party heir in general, or of provision, (as the case requires) as well as in special.

The titles of the court, and acts of the court themselves, will vary somewhat by mention of the general service, as well as the special, but so little, that it is not worth giving an example.

*Claim of a general Service.*

**H**onourable persons, and good men of inquest, Unto your wisdoms says J. H. of A. eldest lawful son of the deceased J. H. of A. That the said deceased J. H. my father, died at the faith and peace of our sovereign Lord George the Third now reigning; and that I am eldest lawful son (grandson, brother, &c.) and nearest heir of line (conquest, &c.) to the said deceased J. H. my father, and that I am of lawful age. Herefore I beseech you, to cognosce and serve me nearest and lawful heir of line, (or conquest, &c.)



to the said deceased J. H. of A. my father, and to retour the said service to his Majesty's chancery, under the most part of your seals, as use is. According to justice, and your wisdoms answer.

*This the procurator, or claimant, should sign.*

When one is served heir of provision in general, in order to make up a title to any procuratory or resignation, or precept upon which no infestment has followed; then, at the second head, say, "And I am nearest lawful  
" heir (male and) of railzie and provision, to  
" the said deceased J. H. by virtue of, and  
" conform to, a disposition and deed of entail;  
" containing the substitution, provisions, conditions, clauses irritant, and resolute, therein specified, with the procuratory of resignation and precept of seisin therein mentioned, granted by A. B. to the said J. H. and  
" his heirs of railzie, and provision therein contained, dated the            day of  
" and recorded in the general register of railzies, the            And that I am of lawful  
" age, &c. as above."

Most people add, after the date and registration of the railzie, "By which disposition  
" and deed of entail, the said A. B. alienated  
" and disposed to, and in favours of, the said  
" J. H. and the heirs-male of his body, whom  
" failing, to            [*And here take in so*  
" much of the substitution, till that part, where-  
" by

" *by the raiser of the briefes is called to the succession.* ] All and whole, [*Here the lands are taken in.*] With and under the provisions, &c. [*And then insert the whole provisions.*"]

The reason of doing this is, because of the common clause in entails appointing the whole provisions, &c. to be insert in the whole subsequent retours and conveyances to the estate; and accordingly for omitting these in a general retour, an heir of entail was found to irritate his right, as is observed by Mr Home, decision 79. But that decision was reversed most justly by the house of Peers; and some of our greatest lawyers since that decision forbid the inserting these provisions in general services, as being absolutely incongruous.

This claim being presented and verified to the jury, a verdict is given by them thereon, in the same manner as the special claim, and a general retour made therefrom by the clerk, which is only the claim turned into Latin, with the variations necessary, on account of the one's being a general, and the other a special retour; but, in other things, and in the manner of expeding the whole, they agree so nearly, that it would be tedious to give an example.

Upon this head of general services, it may be proper to observe, that it is a general rule, that a special service includes a general, as every head of the general service is contained in the special; so that when one has expedie a  
special

special service, there can be no necessity for a general; and this rule holds in all services, as heir of line, male, conquest; but it does not hold in services, as heir of provision, or of tailzie; for a man may be served heir of provision in special, and yet that won't instruct he is heir of provision in general, so as to carry right to some other subject provided by a different deed, upon which no infeftment may have followed, which will thereby be carried by a general service, and which can only be carried by a service particularly relating to that deed.

APPEN-

# A P P E N D I X

To the ORDER, &c. of SERVICES.

## N U M B E R I.

*The method of fencing the court. Vide p. 85.*

**T**HE clerk of court says, and the officer repeats, I fence, and forbid in our sovereign Lord's name and authority, and of the judges here present, delegate and commiffionate for serving thir brieves, by virtue of his Majesty's commiffion granted to them for that effect, under the testimonial of his Majesty's great seal, that none presume to take upon hand to trouble or molest this court, nor make speech one for another without leave asked and given, under the pain of law.

## N U M B E R II.

*The form of the report of the commissioner, anent the verifying of the execution of the brieves, page 92.*

**A**T the ~~day~~ of the which day there was produced to a commiffion of date the given and



and signed by J. G. &c. two of the four ordinary macers, before the Lords of Council and Session, who, or any two of them, are appointed sheriffs in that part of the sheriffdoms of L. and R. by his Majesty's commission under the quarter-seal, for serving of J. H. of A. nearest lawful heir-male of the body of the deceased J. H. of A. his father, upon the            day of

next, within the parliament-house of Edinburgh; by which commission the macers, as sheriffs in that part foresaid, for preventing the expence and trouble of bringing the officer who executes the brieves and witnesses to Edinburgh to depone before them, give full power and commission to the said            with power to him to name a clerk to take and receive the depositions of the officer, executor of the said brieves, and of the witnesses, upon the truth and verity of the executions, after the executions shall be openly read in their presence, and that at            the            day of

and to report the same, with the said commission, to the said macers, before the said            (the day on which the service is to be) which commission being accepted by the said            he made choice of            to be his clerk, who accepted of the said office, and gave his oath *de fidei administratione*.

*The commissioner and clerk sign this.*

Thereafter compeared            officer, and executor of the brieves directed furth of his Majesty's chancery, for serving of the said J. H. of A. nearest lawful heir-male to the said J. H.

M

of

of A. his father, and being solemnly sworn and interrogated by, and in presence of, the said commissioner; and the two brieves, and executions on the back thereof, being openly read in his presence, depones, That he executed the said two brieves in the precise terms of the executions on the back of the same, signed by him and the witnesses who were present thereat, at the several market-crosses following, viz. at the market-cross of R. head burgh of the sheriffdom thereof, the       day of       being the ordinary weekly market-day of the said burgh of R. [*and say the like as to the other burgh*] and which days are the true dates of the executions of the said brieves, signed by the deponent, commissioner, and clerk.

As also compeared [*blank for the designations and names of the two men who were witnesses*] and being both solemnly sworn and interrogated by, and in presence of, the said commissioner; and the before-mentioned two brieves, and executions thereof, being openly read in their presence, depone, That they were present with, and heard and saw the said       [*the officer's name*] officer, execute the said two brieves, in the precise terms of the executions of the same on the backs thereof, signed by him as officer, and the deponents as witnesses thereto; and that the said two brieves were executed at the said two several market-crosses of R. and L. upon the several days mentioned in the said       officer his deposition before written being the ordinary market-days of the said

said several burghs, and which days are the true dates of the executions of the said brieves; and the above is the truth as they shall answer to God; signed by the deponent's commissioner, and clerk.

At the day of what is contained in the preceding pages is the report of the commission before-mentioned signed by the commissioner and clerk, and the same, with the said commission, is returned to the macers of Session.

*This signed by the commissioner and clerk.*

### N U M B E R III.

ADDITIONS to page 69.

**I**T is said a special service regularly should be expedite before the judge-ordinary, within whose jurisdiction the subject is situate. As to which, a great dispute is made, where lands lie in a regality, whether or not a special service may not proceed before the sheriff of the shire within which the regality lies locally, as well as before the bailie of regality; and in support, that the service may proceed before the sheriff, it is urged, That although a regality be erected within a sheriffdom, yet still the sheriff has a jurisdiction, both civil and criminal, over the whole lands lying within the regality: And, although the lord, or bailie of regality, may repledge from the she-

riff, yet where he does not repledge from the sheriff, his decreets are effectual, nor can he repledge, except in matters criminal; so that in matters where he either cannot, or does not replege, it is optional to persons, either to go to the sheriff or regality-court, as they incline: On the other hand, it is said for the lord of regality, that there are several matters which can only be done in the regality, and at the head-burgh thereof, and not at the head-burgh of the shire; as particularly, executions of inhibitions, or denunciations of hornings, whereupon escheat may fall. See act 264, parl. 15. James VI. That the sheriff does not seem, by law, to have any jurisdiction over those who reside within a regality: That the lord of regality may repledge in civil matters as well as criminal: That lords of regality seem to have a peculiar jurisdiction in matters of services; so that they can issue out brieves to themselves, and may also retour the service; which, properly speaking, is no more than giving an extract of the service, and need not retour it to the chancery: That the practice in chancery is always to direct brieves only to the bailies of regality, where lands lie in regalities, and not to the sheriff, and this seems warranted by the act 29, page 1587, anent the *annexation of the temporality of benefices to the crown*; § *The entering of heirs*. And most people of knowledge were of this opinion, when spoke to about this matter; so that it seems not advisable to expedite a service of lands,  
ly-



lying within a regality, before the sheriff. See upon this subject Skene, *de sig. verb. voce Brieve, de morte antecessoris*, and the several references made by him. M'Kenzie's Criminals, part II. title 11. where the nature of regalities in general is cleared up. Craig, lib. 2. title 17. Stair, title *Heirs*, page 468. Hope's Major Practics, H. T.

*Nota*, As by the 20<sup>mo</sup> *Georgii 2di*, all heritable jurisdictions were abolished, of which regalities were, this dispute becomes of little use.

It may be fit to notice here, another doubt which is made, when a commission is granted to the macers, as lords of a regality, whether it be necessary to cause execute the brieves at the head-burgh of the shire, as well as the regality; but it would seem sufficient to do it only at the head-burgh of the regality; for, were the service to proceed before the lord of regality himself, what power could he have to execute the brieves at a place without his jurisdiction; though, in practice, it is frequently done at both.

When bailies or clerks of regality live at a great distance from the lands wherein the heir is to be infest, they commonly grant a substitution in the following form.

I                      bailie depute of the regality of  
do hereby substitute                      to be  
bailie of the said regality under me, for giving  
infestment, by virtue of the foregoing precept,  
to                      I having taken security for the  
M 3                      by-

bygone non-entry-duties, and the relief-duties mentioned in this precept. In witness whereof, I have written and subscribed these presents, at

**I** clerk to the regality of \_\_\_\_\_ hereby depute \_\_\_\_\_ to be clerk of the said regality under me, in order to his being notar to the feilin, to be given to \_\_\_\_\_ by virtue of his precept directed furth of his Majesty's chancery. In witness whereof

And the same deputation may equally be granted by sheriffs, and their clerks.

CASE,

# CASE, AND ANSWER,

Respecting the EFFECT of an ARRESTMENT against an APPARENT HEIR.

The Answer by a WRITER to the SIGNET.

CASE. **A** Is creditor to B in L. 100, by bond, with horning and caption. B is creditor in the same sum, by different bonds and bills of C, and D his son, without diligence; C and D are both now dead, and E their heir is within the *annus deliberandi*, and has not yet determined to represent either of them.

QUERY, What is the proper intimation of B's assignation, in favour of A, of the debts due by C and D? Or if B should refuse such assignation, what is the habile way for A to secure these debts, because an arrestment in the hands of E the heir, who has showed no intention to represent his predecessors, the debtors, would appear to be inept?

ANSWER, The proper intimation of the supposed assignation by B. in favours of A, falls to be made to E the apparent heir of C and D, which will sufficiently complete the assignation, even if E should afterwards renounce; because

because there does not occur, in our practice, any other way of intimating, than to the debtor, when he is alive, and to his apparent heir, when he is dead. And indeed, if B is prevailed upon to assign B and D's debts in favours of A, then A will have little difficulty in the form of following out his right, in order to get at C and D's effects, for payment of the debt due by B to A; for A being in B's right, and consequently, directly creditor to C and D; then, if the effects of C and D are moveable, there is nothing to hinder A, the assignee in their bond, to confirm executor creditor to C and D, or either of them. And if the effects of C and D are heritable, in that case, upon the footing of the assignation, A, the assignee of B, may raise a summons of constitution, on the passive titles, and a charge to enter heir, against E: and if E renounce, decret will go *cognitionis causa contra hared. jacent.* after which A may adjudge in common form, and thereby affect the heritage of C and D.

But, as the second part of the query seems to go a little farther, and to suppose that B refuses granting a voluntary assignation; and then asks what is the habile way for A to secure the debts due by C and D to B, for A's payment. This leads to considerations somewhat different.

And, in the first place, If the debts of C and D, to whom E is apparent heir, but not entered, are heritable, 'tis thought that A's method of

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proceeding will be to lay on an arrestment in the hands of E, as debtor to B, in common form, and to bring a process of furthcoming; in which, beside the ordinary method of libelling, A may also insist upon a fair narrative of the fact, by this additional conclusion, That if E shall renounce to be heir to C and D, whereby no personal decret of furthcoming can go against him, then, and in that case, our Lords of Council and Session should find and declare, that the pursuer has good and undoubted right to obtain a decret declaratory, *contra hereditatem jacentem, et bona mobilia* of C and D; which would be as effectual as a personal decret of furthcoming would have been against E, if he had actually entered heir to C and D, and not renounced. The case does not perhaps often occur; but this method seems to reconcile it sufficiently both to principles and practice.

But what may be still more delicate, seems to be this: If B refuses the voluntary assignment to A, and that C and D, the debtors of B, are dead, leaving only personal and moveable effects; the question occurs, In what way A shall affect these moveables belonging to C and D, for a debt due by B to A, while B refuses voluntarily to put A in his place by assignment.

I apprehend the method will be this, That A may bring a process against B, for adjudging the bond or bonds, due by C and D to B, and sums therein contained, to belong to A, to the effect

effect he may have the same action against the effects, and *bona mobilia* of C and D, as if B had voluntarily assigned to A, or as if A were the original creditor in the bond granted to B. Such a process seems to be founded in common sense, and is perfectly analogous to what is called a general charge, and adjudication to a special effect; and when such a decret is obtained by A in his favours, in which B may be the only proper defender or contradictor, then A being thereby placed in B's right, in virtue of the adjudication, may confirm executor creditor to the effects of C and D.

The querist seems to be under one mistake, in supposing that an arrestment in the hands of E is altogether inept, because E may not have discovered a disposition to enter and represent; for if he should change his mind and enter, I conceive the arrestment, though prior to that entry, would be effectual; though, no doubt, if he renounced, it would have no influence.

F I N I S.